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# PLEADING DISABILITY

JOSEPH A. SEINER\*

**Abstract:** *A significant failure.* That is how the Americans with Disabilities Act (“ADA”) has been described by legal scholars and disability advocates alike. The statute was widely expected to help prevent disability discrimination in employment, but it has not fully achieved its intended purpose because of the narrow interpretation of the ADA by the courts. Congress recently sought to restore the employment protections of the ADA by amending the statute. Interpreting the complex and comprehensive amendments to the ADA will be a difficult task for the federal courts. Complicating matters further, the proper pleading standard for disability claims was left in disarray after the U.S. Supreme Court’s decisions in 2007 in *Twombly v. Bell Atlantic Corp.*, and in 2009 in *Ashcroft v. Iqbal*, which altered fifty years of federal pleading precedent by extending the plausibility standard to *all* civil matters. This Article examines the impact of the *Bell Atlantic* decision on ADA claims and proposes a unified analytical framework for alleging disability discrimination that satisfies recent case law, the ADA amendments, and the Federal Rules of Civil Procedure. The proposed model would streamline the pleading process for disability claims and provide a blueprint for litigants and courts in analyzing cases under the revised ADA.

*I seldom think about my limitations, and they never make me sad. Perhaps there is just a touch of yearning at times, but it is vague, like a breeze among flowers. The wind passes, and the flowers are content.*

—Helen Keller<sup>1</sup>

## INTRODUCTION

Former Vice President Hubert H. Humphrey once observed that “[t]he moral test of government is how that government treats” the dis-

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\* Joseph Seiner is an assistant professor at the University of South Carolina School of Law. The author would like to thank Lisa Eichhorn, Benjamin Gutman, and Daniel Vail for their generous assistance with this Article. The author also acknowledges the loving support of his wife, Megan, that made this Article possible. This Article is dedicated to Joseph Sweeney Seiner—always remember that you can achieve whatever you desire. Any errors, miscalculations, or misstatements are entirely those of the author.

<sup>1</sup> Alden Whitman, *Helen Keller, 87, Dies*, N.Y. TIMES, June 2, 1968, available at <http://www.nytimes.com/learning/general/onthisday/bday/0627.html>. This quotation was included in Helen Keller’s obituary. *Id.*

abled.<sup>2</sup> The Americans with Disabilities Act of 1990 (“ADA”) was a significant attempt on the part of the government to level the playing field for individuals with disabilities: and to do so, the statute provides numerous protections against employment discrimination.<sup>3</sup> Unfortunately, however, the U.S. Supreme Court has taken a very narrow approach to the issue of coverage under the statute, and the federal courts (following the Supreme Court’s lead) have not been sympathetic to disability discrimination claims.<sup>4</sup>

Congress recently responded to the federal courts’ narrowing of disability protections by enacting the ADA Amendments Act of 2008 (“ADAAA” or “amendments”), which took effect on January 1, 2009.<sup>5</sup> The amendments provide that Congress’s expectation of broad coverage under the statute “has not been fulfilled,”<sup>6</sup> and that the Supreme Court has too narrowly construed the meaning of the term “disability” in its decisions.<sup>7</sup> Through the amendments, Congress sought to “rein-stat[e] a broad scope of protection” under the statute.<sup>8</sup> These recent amendments favoring broad coverage under the ADA will require the courts to analyze disability claims more closely. The complexity of the new provisions, however, will make this a difficult task.

Complicating matters further, in the 2007 case, *Twombly v. Bell Atlantic Corp.*,<sup>9</sup> the U.S. Supreme Court “retire[d]”<sup>10</sup> fifty years of pleading precedent by abandoning the well-established standard from *Conley v. Gibson*,<sup>11</sup> that a complaint must be allowed to proceed unless “the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>12</sup> In its place, the Court adopted a new standard requir-

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<sup>2</sup> See Susan Rozelle, *Fear and Loathing in Insanity Law: Explaining the Otherwise Inexplicable* Clark v. Arizona, 58 CASE W. RES. L. REV. 19, 23 n.16 (2007).

<sup>3</sup> See 42 U.S.C. §§ 12111–12117 (2006) (statutory provisions of Title I of ADA).

<sup>4</sup> See Charles Craver, *The Judicial Disabling of the Employment Discrimination Provisions of the Americans with Disabilities Act*, 18 LAB. LAW. 417, 418 (2003) (“A series of recent Supreme Court decisions has narrowed the scope of ADA coverage to severely limit statutory protection to individuals with relatively severe disabilities.”); Alex Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 217 (2008) (“Studies consistently reveal that, despite the ADA, employees who claim to be the victims of disability discrimination in the workplace face long odds.”).

<sup>5</sup> ADAAA, Pub. L. No. 110-325, §§ 2(a)(3), 8, 122 Stat. 3553, 3553 (2008).

<sup>6</sup> *Id.* §§ 1, 2(a)(3), 122 Stat. 3553, 3553.

<sup>7</sup> *Id.* § 2(a)(4)–(5), 122 Stat. 3553, 3553.

<sup>8</sup> *Id.* § 2(b)(1), 122 Stat. 3553, 3554.

<sup>9</sup> 550 U.S. 544 (2007).

<sup>10</sup> *Id.* at 563.

<sup>11</sup> See 355 U.S. 41, 45–46 (1957).

<sup>12</sup> *Id.*

ing that a plaintiff's complaint allege "enough facts to state a claim to relief that is *plausible* on its face."<sup>13</sup> Though *Bell Atlantic* arose in the context of a complex antitrust case, the decision has been applied to disability claims by federal courts in almost every circuit.<sup>14</sup> Additionally, in 2009, in *Ashcroft v. Iqbal*, the Supreme Court clarified that the *Bell Atlantic* standard applies to "all civil actions," including "antitrust and discrimination suits alike."<sup>15</sup> Studies already suggest that the plausibility standard is having an impact in employment discrimination and civil rights cases.<sup>16</sup>

There has been only limited examination of the impact of the *Bell Atlantic* decision on disability discrimination claims, and this Article seeks to fill this void in the scholarship.<sup>17</sup> I recently examined approximately 500 federal district court opinions from the year before and after the Supreme Court's ruling.<sup>18</sup> The results of this study reveal a higher percentage of district court opinions granting motions to dismiss in the disability context in the year following the *Bell Atlantic* decision compared to the year prior to the Supreme Court case.<sup>19</sup> This study specifically compared those decisions issued prior to *Bell Atlantic* that relied on *Conley* to those decisions issued after *Bell Atlantic* that relied on *Bell Atlantic*.<sup>20</sup> An individual examination of these cases was even more revealing, however, as the opinions do *not* reflect that the courts are uniformly using the plausibility standard to dismiss disability claims.<sup>21</sup> Rather, the review of the decisions suggests a significant amount of confusion over the proper pleading standard to apply and a conflict in the courts over the level of specificity needed to allege a disability claim in the employment context.<sup>22</sup>

When pleading a disability case, then, litigants are receiving conflicting signals.<sup>23</sup> After *Bell Atlantic*, the lower courts are in disarray over the amount of specificity that must be alleged in the complaint, with

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<sup>13</sup> *Bell Atlantic*, 550 U.S. at 570 (emphasis added).

<sup>14</sup> See *infra* notes 216–242 and cases accompanying note 212.

<sup>15</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

<sup>16</sup> See *infra* note 173 and accompanying text.

<sup>17</sup> See generally Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, AM. U. L. REV. (forthcoming) (manuscript at 35, 58, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1487764](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1487764)) (performing empirical analysis of impact of *Twombly* and *Iqbal* on various claims and briefly addressing ADA claims).

<sup>18</sup> See *infra* notes 176–190 and accompanying text.

<sup>19</sup> See *infra* notes 191–192 and accompanying text.

<sup>20</sup> See *infra* notes 176–190 and accompanying text.

<sup>21</sup> See *infra* notes 210–242 and accompanying text.

<sup>22</sup> See *infra* notes 210–266 and accompanying text.

<sup>23</sup> See *infra* notes 210–266 and accompanying text.

some courts imposing a highly demanding standard.<sup>24</sup> At the same time, Congress has attempted to relax the standards for proving a disability claim under the ADA through the recent amendments to the statute.<sup>25</sup> Unfortunately, the confusion already faced by the courts and litigants in applying the *Bell Atlantic* decision to disability claims will only intensify as the courts begin to grapple with how to interpret the revised statute. There is no reason that alleging an ADA discrimination claim need be a complicated or complex process: a unified pleading standard would bring consistency to this area of the law and resolve the current confusion over what must be alleged in a disability plaintiff's complaint.

This Article attempts to provide the simplicity so sorely needed in this area of the law and resolve the current confusion over the proper pleading standard by proposing a new analytical framework for claims of disability discrimination.<sup>26</sup> The model presented in this Article addresses the two primary types of disability claims brought under the ADA in the employment context—those claims alleging an adverse employment action on the basis of disability and those claims asserting the denial of a reasonable accommodation by the employer.<sup>27</sup> Addressing each of these claims in turn, this Article proposes a unified pleading framework for alleging disability discrimination.<sup>28</sup> The model set forth below is intended to serve as a blueprint for the courts and litigants on disability pleading, and will hopefully remove the guesswork from this area of the law, thus resulting in a significant savings of judicial resources.<sup>29</sup>

This Article begins by explaining the federal pleading rules and examining the Supreme Court's *Bell Atlantic* decision (as recently confirmed by *Iqbal*), which altered the legal landscape for employment discrimination plaintiffs.<sup>30</sup> Next, this Article explores the basic structure of the ADA and provides a detailed analysis of how the recent amendments to the statute will affect disability discrimination suits.<sup>31</sup> Then, this Article provides an analysis of the impact of the *Bell Atlantic* decision on disability claims and explains how that analysis reveals a significant level of confusion in the federal courts over the proper pleading

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<sup>24</sup> See *infra* notes 54–73 and accompanying text.

<sup>25</sup> See *infra* notes 107–169 and accompanying text.

<sup>26</sup> See *infra* notes 267–366 and accompanying text.

<sup>27</sup> See *infra* notes 267–366 and accompanying text.

<sup>28</sup> See *infra* notes 267–366 and accompanying text.

<sup>29</sup> See *infra* notes 267–366 and accompanying text.

<sup>30</sup> See *infra* notes 36–73 and accompanying text.

<sup>31</sup> See *infra* notes 74–169 and accompanying text.

standard in ADA cases.<sup>32</sup> Finally, this Article attempts to resolve the existing confusion by providing a unified analytical framework for analyzing disability claims.<sup>33</sup> This proposed new model specifically addresses adverse action and failure-to-accommodate cases that are brought under the ADA.<sup>34</sup> The Article concludes by exploring the possible implications of adopting the proposed framework.<sup>35</sup>

## I. DISMISSAL UNDER FEDERAL LAW

### A. *The Development of the Federal Pleading Standard*

The Federal Rules of Civil Procedure (“federal rules”) are extremely clear on the standard for pleading a claim. Rule 8(a)(2) states that a plaintiff must set forth in the complaint “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>36</sup> This simple requirement, however, has generated enormous controversy. In 1957, in *Conley v. Gibson*, the U.S. Supreme Court attempted to resolve any ambiguity over the federal pleading standard, emphasizing that a litigant’s complaint should be liberally construed.<sup>37</sup> The *Conley* Court established a clear and concise standard for asserting a claim, holding that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff *can prove no set of facts* in support of his claim which would entitle him to relief.”<sup>38</sup>

The straightforward, inclusive approach set forth in *Conley* persisted for half of a century, until the Supreme Court’s 2007 decision in *Bell Atlantic Corp. v. Twombly*.<sup>39</sup> There, the Court considered the sufficiency of a complaint in a complex antitrust lawsuit.<sup>40</sup> The Court revisited the *Conley* decision, and “retire[d]” the “no set of facts language,” holding:

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<sup>32</sup> See *infra* notes 170–266 and accompanying text.

<sup>33</sup> See *infra* notes 267–366 and accompanying text.

<sup>34</sup> See *infra* notes 267–366 and accompanying text.

<sup>35</sup> See *infra* notes 367–383 and accompanying text. It should be noted that while this Article was going to print, the EEOC was in the process of revising its ADA regulations. See *infra* note 149 (noting notice of proposed rulemaking for revisions to ADA regulations). This Article thus does not contemplate those revisions—nonetheless, plaintiffs must be cautious to comply with those revised guidelines when they are finalized.

<sup>36</sup> FED. R. CIV. P. 8(a)(2).

<sup>37</sup> 355 U.S. 41, 47–48 (1957). “The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.” *Id.* at 48.

<sup>38</sup> *Id.* at 45–46 (emphasis added).

<sup>39</sup> See 550 U.S. 544, 562–63 (2007).

<sup>40</sup> *Id.* at 547–53.

*Conley*'s "no set of facts" language has been questioned, criticized, and explained away long enough. . . [A]fter puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.<sup>41</sup>

In abandoning the "no set of facts language," the *Bell Atlantic* Court replaced this standard with a plausibility requirement.<sup>42</sup> Thus, the Court concluded that a sufficient complaint need not include a "heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."<sup>43</sup> A complaint that fails to cross the "line from conceivable to plausible" must be dismissed.<sup>44</sup> The *Bell Atlantic* Court was also clear that a complaint include "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."<sup>45</sup> Rather, the "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."<sup>46</sup>

More recently, in 2009, in *Ashcroft v. Iqbal*, the U.S. Supreme Court examined the scope of the plausibility standard in a *Bivens* action brought against certain federal officials, including former Attorney General John Ashcroft and the Director of the Federal Bureau of Investigation.<sup>47</sup> The Court clarified that the *Bell Atlantic* standard applies to any civil cause of action, including "antitrust and discrimination suits alike."<sup>48</sup> Referencing *Bell Atlantic*, the Court emphasized that some factual development is required in the complaint, as pleading a civil action "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."<sup>49</sup>

The Court further noted that when determining whether discriminatory intent has been sufficiently alleged, the "factual context" of the

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<sup>41</sup> *Id.* at 562–63.

<sup>42</sup> *Id.* at 570.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> 550 U.S. at 555 (citations omitted).

<sup>46</sup> *Id.* (citations omitted).

<sup>47</sup> 129 S. Ct. 1937, 1942–44 (2009).

<sup>48</sup> *Id.* at 1953.

<sup>49</sup> *Id.* at 1949.

complaint should also be considered.<sup>50</sup> Thus, a plaintiff cannot “plead the bare elements of his cause of action . . . and expect his complaint to survive a motion to dismiss.”<sup>51</sup> The Court emphasized that conclusory allegations must fail, and that discriminatory intent cannot be asserted “generally.”<sup>52</sup> Thus, *Iqbal* leaves little doubt that the *Bell Atlantic* plausibility standard is applicable to all civil claims, and that general, conclusory complaints cannot be permitted to stand.<sup>53</sup> The *Iqbal* case is simply too recent to allow for analyzing how the lower courts have applied the decision, though further research on this topic will provide additional guidance on the contours of the plausibility standard.

### B. *The Impact of Bell Atlantic*

The full impact of the *Bell Atlantic* decision is still not known. It is clear, however, that the plausibility standard established by the Court will not be confined to the antitrust area, and many courts have already applied this holding to other legal contexts.<sup>54</sup> As noted above, in *Iqbal* the Supreme Court clarified that the *Bell Atlantic* standard should apply to “all civil actions.”<sup>55</sup> Legal scholars are divided, though, on whether the plausibility standard will ultimately create a heightened pleading requirement for plaintiffs.<sup>56</sup>

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<sup>50</sup> *Id.* at 1954.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See 129 S. Ct. at 1937.

<sup>54</sup> See Joseph Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1038 (discussing application of *Bell Atlantic* to employment discrimination cases) (copyright to the *University of Illinois Law Review* is held by The Board of Trustees of the University of Illinois); Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1814–15 (2008) (“[W]hile some commentators have suggested that *Twombly* will only apply in the antitrust context, this study shows that courts have applied the decision in every substantive area of law governed by Rule 8.”).

<sup>55</sup> See *Iqbal*, 129 S. Ct. at 1953 (citations omitted).

<sup>56</sup> See Hannon, *supra* note 54, at 1824–28 (setting forth academic response to *Bell Atlantic*). Compare Allen Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 634 (2007) (“Happily, the ‘heightened pleading’ interpretation of *Bell Atlantic* is not a necessary interpretation. Moreover, there are at least five grounds on which that interpretation can and ought to be resisted, i.e., aside from the fact that it is just plain wrong.”), with Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 121, 126 (2007), <http://www.virginialawreview.org/inbrief/2007/07/02/dodson.pdf> (“In short, the best reading of *Bell Atlantic* is that Rule 8 now requires notice-plus pleading for all cases (though especially for cases with costly discovery).”).



The limited empirical data on this issue have revealed interesting results. In the months immediately following *Bell Atlantic*, it was suggested that the decision had a substantial impact on the dismissal rate of civil rights claims.<sup>57</sup> Additionally, a recent study that I performed examined the dismissal rates of federal employment discrimination cases brought under Title VII of the Civil Rights Act of 1964 ("Title VII") in the year before and after *Bell Atlantic*.<sup>58</sup> Title VII prohibits discrimination on the basis of race, color, sex, national origin, and religion.<sup>59</sup> The study revealed that district courts relying on the new Supreme Court decision granted a higher percentage of motions to dismiss brought in the Title VII context than courts that had previously relied on *Conley*, and an individual review of the decisions demonstrated that some courts were undeniably using the Supreme Court's plausibility standard to reject claims brought under Title VII.<sup>60</sup>

### C. Pleading Employment Discrimination Claims

The propensity of the U.S. district courts to use the *Bell Atlantic* decision to dismiss civil rights cases and Title VII claims suggests that all plaintiffs should be cautious when pleading an employment discrimination complaint.<sup>61</sup> Interestingly, the Supreme Court's recent analysis of the pleading requirements for employment claims suggested a more relaxed standard, though this occurred in a pre-*Bell Atlantic* decision.<sup>62</sup>

In 2002, in *Swierkiewicz v. Sorema*, the Court considered the sufficiency of a complaint brought pursuant to Title VII and the Age Discrimination in Employment Act ("ADEA").<sup>63</sup> The pleadings in the case

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<sup>57</sup> Hannon, *supra* note 54, at 1827 tbl. 3.

<sup>58</sup> Seiner, *supra* note 54, at 1029–34. The study compared those motions to dismiss brought in the Title VII context in the year prior to *Bell Atlantic* which relied on the *Conley* decision to those decisions issued the year after *Bell Atlantic* which relied on the *Bell Atlantic* decision. *Id.* at 19–21.

<sup>59</sup> 42 U.S.C. § 2000e-2(a)(1) (2006) (making it unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

<sup>60</sup> Seiner, *supra* note 54, at 1029–34. See generally Hatamyar, *supra* note 17; Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly* 14–15 (Illinois Public Law Research Paper No. 09-16, 2009), available at <http://ssrn.com/abstract=1494683> (discussing empirical studies of *Iqbal* and *Twombly* decisions).

<sup>61</sup> See Seiner, *supra* note 54, at 1029–34.

<sup>62</sup> *Swierkiewicz v. Sorema*, 534 U.S. 506, 509–10 (2002).

<sup>63</sup> *Id.*

alleged that [plaintiff] had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA. [Plaintiff's] complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination.<sup>64</sup>

In upholding the complaint, the Court held that “it is not appropriate to require a plaintiff to plead facts establishing a prima facie case.”<sup>65</sup> The Court emphasized that “the precise requirements of a prima facie case can vary depending on the context and were ‘never intended to be rigid, mechanized, or ritualistic.’”<sup>66</sup> The Court therefore rejected a “heightened pleading standard” for employment discrimination cases, finding that a complaint is sufficient where it gives the defendant “fair notice of what [plaintiff's] claims are and the grounds upon which they rest.”<sup>67</sup>

It is unclear what impact the more recent *Bell Atlantic* decision will have on the pleading standard for employment discrimination cases set forth in *Swierkiewicz*.<sup>68</sup> At a minimum, the *Swierkiewicz* decision's reliance on *Conley* is troubling.<sup>69</sup> Additionally, the lower courts' rigid application of *Bell Atlantic* to Title VII claims suggests that the plausibility standard is chipping away at the more liberal pleading requirements found in *Swierkiewicz* for discrimination claims.<sup>70</sup> Nonetheless, *Bell Atlantic* cites *Swierkiewicz* with approval, further adding to the confusion surrounding the applicable pleading standard for employment cases.<sup>71</sup> This confusion was only intensified after the Supreme Court's recent case on pleading standards, *Ashcroft v. Iqbal*, failed to cite *Swierkiewicz* at all.<sup>72</sup> Thus, the fate of *Swierkiewicz* remains an open question after *Bell Atlantic* and *Iqbal*, and significant uncertainty surrounds what a plaintiff must allege to sufficiently plead a claim of employment discrimination.<sup>73</sup>

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<sup>64</sup> *Id.* at 514 (citation omitted).

<sup>65</sup> *Id.* at 511.

<sup>66</sup> *Id.* at 512 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

<sup>67</sup> *Id.* at 514.

<sup>68</sup> See Seiner, *supra* note 54, at 1019–21 (discussing impact of *Bell Atlantic* on *Swierkiewicz*).

<sup>69</sup> See *Swierkiewicz*, 534 U.S. at 512, 514.

<sup>70</sup> See Seiner, *supra* note 54, at 1029–34 (discussing results of empirical analysis of *Bell Atlantic* in Title VII and civil rights claims).

<sup>71</sup> *Bell Atlantic*, 550 U.S. at 555, 570.

<sup>72</sup> See *Iqbal*, 129 S. Ct. at 1942–55.

<sup>73</sup> See *id.* at 1953; *Bell Atlantic*, 550 U.S. at 555, 570. Because *Bell Atlantic* cites to *Swierkiewicz* with approval and *Iqbal* does not express an opinion about the decision what-

## II. DISABILITY DISCRIMINATION UNDER FEDERAL LAW

The Supreme Court has never spoken directly on the overall standard for pleading a disability discrimination case under Title I of the ADA. Thus, determining what must be alleged to establish a sufficient ADA complaint is largely a matter of guesswork for litigants and the courts, particularly given the specialized nature of these claims. The Court's decision in *Swierkiewicz v. Sorema*—to the extent it is still good law—makes clear that an ADA complaint need not set forth all of the facts necessary to establish a *prima facie* case.<sup>74</sup> And from *Twombly v. Bell Atlantic Corp.* and *Ashcroft v. Iqbal*, we now know that an ADA plaintiff must assert a plausible claim of disability discrimination.<sup>75</sup> How these standards come together when fashioning the specifics of an ADA complaint, however, is much less clear. And, this confusion has only increased with the recent amendments to the ADA.<sup>76</sup> A review of the basic requirements of the ADA, and how the recent amendments changed the disability landscape, helps reveal the basic elements that should be set forth in any disability claim.<sup>77</sup>

### A. The Americans with Disabilities Act of 1990

Title I of the ADA, which addresses claims of discrimination in employment, went into effect on July 26, 1992.<sup>78</sup> In passing the Act, Congress noted that forty-three million Americans have some form of disability and that this number will increase over time.<sup>79</sup> Congress also ac-

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soever, it is a fair inference that *Swierkiewicz* remains good law at least in relation to employment discrimination cases. See *Iqbal*, 129 S. Ct. at 1953; *Bell Atlantic*, 550 U.S. at 555, 570. At a minimum, however, *Swierkiewicz* should be read in the context of *Iqbal* and *Bell Atlantic*, as all civil claims must now satisfy the plausibility standard. See *Iqbal*, 129 S. Ct. at 1953; *Bell Atlantic*, 550 U.S. at 555, 570. See generally Joseph A. Sciner, *After Iqbal*, 45 WAKE FOREST L. REV. (forthcoming 2010) (manuscript at 17–19, 30–33, available at <http://ssrn.com/abstract=1477519>) (arguing that *Swierkiewicz* is good law for Title VII cases); Thomas, *supra* note 60, at 16–18 (discussing arguments as to the viability of the *Swierkiewicz* decision and concluding that the case may no longer be good law).

<sup>74</sup> 534 U.S. 506, 511 (2002).

<sup>75</sup> See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009); *Twombly v. Bell Atlantic Corp.*, 550 U.S. 544, 570 (2007).

<sup>76</sup> ADAAA, Pub. L. No. 110-325, § 8, 122 Stat. 3553, 3559 (2008). The ADAAA went into effect on January 1, 2009. *Id.*

<sup>77</sup> See *infra* notes 78–169 and accompanying text.

<sup>78</sup> See 42 U.S.C. § 12111–12117 (2006) (statutory provisions of Title I of ADA, before ADAAA); Peter Blanck, *The Burton Blatt Institute: Centers of Innovation on Disability at Syracuse University*, 56 SYRACUSE L. REV. 201, 213 n.95 (2006) (noting effective date of ADA).

<sup>79</sup> 42 U.S.C. § 12101(a)(1) (2006). This provision was recently removed as a result of the ADAAA. ADAAA § 3.

knowledge of the propensity of our society to “isolate and segregate” those with disabilities, including in the employment context.<sup>80</sup> Congress stated that a proper goal for the United States was to make certain that individuals with disabilities enjoyed “equality of opportunity, full participation, independent living, and economic self-sufficiency.”<sup>81</sup> The purpose of the ADA was clear: The statute would create a “national mandate for the elimination of discrimination against individuals with disabilities.”<sup>82</sup> And, the ADA would “provide clear, strong, consistent enforceable standards addressing discrimination against individuals with disabilities” that would be enforced by the federal government.<sup>83</sup>

### 1. Employment Provisions and Coverage

The ADA makes it unlawful for an employer with fifteen or more employees<sup>84</sup> to “discriminate against a qualified individual on the basis of disability.”<sup>85</sup> A qualified individual is defined by the act as “an individual who, with or without reasonable accommodation, can perform the essential functions” of the job.<sup>86</sup> In addition to prohibiting discrimination in the terms and conditions of employment,<sup>87</sup> the ADA requires that an employer provide “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability,” absent an undue hardship to the employer.<sup>88</sup> Thus, under the ADA, employers have two primary obligations not to discriminate: they cannot take an adverse action against an individual because of his or her disability, and they must reasonably accommodate workers who have disabilities.<sup>89</sup> Moreover, employers cannot retaliate against individuals based upon the exercise of their rights under the ADA.<sup>90</sup>

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<sup>80</sup> 42 U.S.C. § 12101(a)(1)–(3).

<sup>81</sup> *Id.* § 12101(a)(7).

<sup>82</sup> *Id.* § 12101(b)(1).

<sup>83</sup> *Id.* § 12101(b)(2)–(3).

<sup>84</sup> 42 U.S.C.A. § 12111(5)(A) (West 2005 & Supp. 2009).

<sup>85</sup> *Id.* § 12112(a). This operative language is the result of the recent amendments to the ADA. The original provision prohibited discrimination “against a qualified individual with a disability because of the disability of such individual.” 42 U.S.C. § 12112(a).

<sup>86</sup> 42 U.S.C.A. § 12111(8).

<sup>87</sup> *Id.* § 12112(a)–(b).

<sup>88</sup> *Id.* § 12112(b)(5).

<sup>89</sup> *Id.* § 12112(a)–(b).

<sup>90</sup> *Id.* § 12203 (“No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.”). It should be noted that the retaliation provisions of the ADA are found in Title V of the statute. *Id.*

An employee is not protected by the ADA unless that individual is considered disabled under the statute.<sup>91</sup> The statute provides three different bases for coverage.<sup>92</sup> First, an individual is covered by the statute if that individual has “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.”<sup>93</sup> Second, an individual is protected if that individual has “a record of such an impairment.”<sup>94</sup> Finally, an individual is considered disabled if that individual is “regarded as having such an impairment” by the employer.<sup>95</sup> Thus, the ADA provides coverage to individuals with actual disabilities, to individuals with a record of a disability, and to those who are regarded as disabled by their employers.<sup>96</sup>

## 2. Impact of the ADA

The ADA certainly has gone a long way towards eradicating discrimination in the workplace on the basis of disability and in providing relief to those who have suffered discrimination.<sup>97</sup> Nonetheless, discrimination in this area still exists and individuals continue to bring thousands of charges of unlawful treatment on the basis of disability each year.<sup>98</sup> In 2008, the Equal Employment Opportunity Commission (“EEOC”), which enforces employment discrimination claims brought under the ADA in the private sector,<sup>99</sup> received 19,453 charges of disability discrimination.<sup>100</sup> During the same fiscal year, the EEOC recovered \$57.2 million in monetary benefits for disability claims, an amount *exclusive* of any “monetary benefits obtained through litigation.”<sup>101</sup>

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<sup>91</sup> *Id.* § 12102(1).

<sup>92</sup> 42 U.S.C.A. § 12102(1).

<sup>93</sup> *Id.* § 12102(1)(A).

<sup>94</sup> *Id.* § 12102(1)(B).

<sup>95</sup> *Id.* § 12102(1)(C).

<sup>96</sup> *Id.* § 12102(1). These categories are identical both before and after the statutory amendments. Compare 42 U.S.C. § 12102(2) (2006), with 42 U.S.C.A. § 12102(1). The way in which the categories are interpreted has changed significantly. See *infra* notes 107–169 and accompanying text (describing effect of recent amendments to the ADA).

<sup>97</sup> See EEOC, ADA Charge Data—Monetary Benefits, FY 1997–FY 2008, <http://www.eeoc.gov/eeoc/statistics/enforcement/ada-monetary.cfm> (last visited Dec. 1, 2009) (setting forth monetary benefits recovered by EEOC for individuals with disabilities by various categories).

<sup>98</sup> See EEOC, Americans with Disabilities Act of 1990 (ADA) Charges, FY 1997–FY 2008, <http://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm> (last visited Dec. 1, 2009).

<sup>99</sup> 42 U.S.C.A. § 12117.

<sup>100</sup> See ADA Charges, *supra* note 98. Between July 26, 1992, and the end of fiscal year 2008, the EEOC received a total of 272,652 charges of discrimination based on disability. *Id.*

<sup>101</sup> See *id.*

Despite the positive impact of the statute, the ADA was widely criticized as not achieving its original purpose.<sup>102</sup> Some advocates described the ADA simply as “a huge disappointment.”<sup>103</sup> The primary concern over the effectiveness of the statute was the constricted reading of the ADA by the courts.<sup>104</sup> In particular, critics argued that the courts narrowly interpreted the term “disability” under the ADA, thereby prohibiting many litigants from even qualifying for protection under the statute.<sup>105</sup> This significant wave of criticism recently led to substantial amendments of the statute.<sup>106</sup>

### B. Amendments to the ADA

The ADA Amendments Act of 2008 (“ADAAA” or “amendments”) was signed into law by President George W. Bush on September 25, 2008,<sup>107</sup> and took effect on January 1, 2009.<sup>108</sup> The amendments gained *unanimous* support in the U.S. Senate, and also received support from business organizations such as the U.S. Chamber of Commerce.<sup>109</sup> The amendments, which came after five years of deliberations on the is-

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<sup>102</sup> See, e.g., Katherine R. Annas, Note, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams: Part of an Emerging Trend of Supreme Court Cases Narrowing the Scope of the ADA*, 81 N.C. L. REV. 835, 835 (2003) (noting that the statute has “failed to fulfill its promise”); Sarah J. Parrot, Note, *The ADA and Reasonable Accommodation of Employees Regarded as Disabled: Statutory Fact or Bizarre Fiction?*, 67 OHIO ST. L.J. 1495, 1496 (2006) (“[W]ith the judicial opinions that soon issued [following the enactment of the ADA], both the drafters and backers of Title I were alarmed because its provisions were not interpreted by the federal judiciary as anticipated.”).

<sup>103</sup> Long, *supra* note 4, at 217.

<sup>104</sup> See Craver, *supra* note 4, at 418 (“A series of recent Supreme Court decisions has narrowed the scope of ADA coverage to severely limit statutory protection to individuals with relatively severe disabilities.”); Annas, *supra* note 102, at 835 (“Since its enactment, the Supreme Court has begun to narrow the scope and coverage of the ADA.”); Parrot, *supra* note 102, at 1496–98 (“By the mid-1990s, disability rights scholars began to identify and criticize the judiciary’s ‘backlash’ against the ADA. . . . The results of empirical studies of cases involving Title I indicated that . . . the judiciary tended to interpret Title I in a narrowing manner.”).

<sup>105</sup> See Craver, *supra* note 4, at 434–36 (discussing the Supreme Court’s narrow definition of disability); Annas, *supra* note 102, at 835–36 (discussing narrowing of the disability definition); Parrot, *supra* note 102, at 1497 (“The drafters and other commentators perceived a movement within the judiciary to narrow the scope of the ADA, particularly in regard to the fundamental issue of which individuals qualify as disabled and are thus entitled to protection under the statute.”).

<sup>106</sup> See Long, *supra* note 4, at 217–18 (discussing recent amendments to ADA).

<sup>107</sup> Press Release, U.S. Federal News, *President Bush Signs S. 3406 into Law* (Sept. 25, 2008); Long, *supra* note 4, at 217.

<sup>108</sup> ADAAA, Pub. L. No. 110-325, § 8, 122 Stat. 3553, 3559 (2008).

<sup>109</sup> David Savage, *Job Discrimination Bill to Widen Who’s Covered*, L.A. TIMES, Sept. 22, 2008, at 13.

sue,<sup>110</sup> attempt to override a “series of Supreme Court rulings that sharply limited who was covered by” the statute.<sup>111</sup>

The major purpose of the ADAAA is to “address some of the more controversial and problematic aspects of the definition of disability.”<sup>112</sup> The text of the amendments states that Congress’s expectation that the term disability would be broadly interpreted “has not been fulfilled,”<sup>113</sup> and that the Supreme Court has too narrowly construed the meaning of the term in its decisions in 1999 in *Sutton v. United Air Lines*,<sup>114</sup> and in 2002 in *Toyota Motor Manufacturing v. Williams*.<sup>115</sup> The amendments, therefore, explicitly seek to “reinstat[e] a broad scope of protection” under the statute.<sup>116</sup> The ADAAA’s most significant change is its “fairly dramatic” alteration of the definition of who should be protected under the statute.<sup>117</sup> Congress made clear in the amendments that the disability definition “shall be construed in favor of broad coverage” up to “the maximum extent permitted by the terms of this Act.”<sup>118</sup>

### 1. Redefining Disability

In redefining the term “disability” under the ADA, Congress made clear that the threshold question of whether an individual is disabled under the statute “should not demand extensive analysis.”<sup>119</sup> Rather, Congress sought to shift the focus from whether an individual is covered by the statute to whether the employer has discriminated against an individual with a disability.<sup>120</sup> Thus, Congress plainly stated that the “primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations.”<sup>121</sup>

The revisions to the statute leave the basic structure of the definition of disability intact.<sup>122</sup> Thus, individuals are disabled if they have “a

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<sup>110</sup> David Savage, *More Protection for Impaired Workers: Anti-Bias Bill Topples Restrictive Court Rulings*, CHI. TRIB., Sept. 24, 2008, at 12.

<sup>111</sup> *Id.*

<sup>112</sup> Long, *supra* note 4, at 218.

<sup>113</sup> ADAAA § 2(a)(3).

<sup>114</sup> See 527 U.S. 471, 482 (1999); see ADAAA § 2(a)(4).

<sup>115</sup> See 534 U.S. 184, 197–98 (2002); see ADAAA § 2(a)(5).

<sup>116</sup> ADAAA § 2(b)(1).

<sup>117</sup> See Long, *supra* note 4, at 218.

<sup>118</sup> ADAAA § 4.

<sup>119</sup> *Id.* § 2(b)(5).

<sup>120</sup> See *id.*

<sup>121</sup> *Id.* § 4(a).

<sup>122</sup> Compare *id.* § 4, with 42 U.S.C. § 12102(2) (2006).

physical or mental impairment that substantially limits one or more major life activities;” have “a record of such an impairment;” or are “regarded as having such an impairment.”<sup>123</sup> The language of the ADAAA is largely identical to the original ADA when defining these three basic categories of coverage.<sup>124</sup> The ADAAA makes significant changes, however, to how these categories are interpreted. More specifically, the ADAAA provides guidance on what constitutes a major life activity, the meaning of “substantially limited,” the effect of using corrective measures, and the interpretation of the term “regarded as disabled.”<sup>125</sup>

## 2. What Is a Major Life Activity?

The ADA provides that an individual is disabled where that individual has a physical or mental impairment that substantially limits a *major life activity*.<sup>126</sup> The ADA failed to define what constitutes a major life activity,<sup>127</sup> however, and left this task to the EEOC in its regulations.<sup>128</sup> Unfortunately, the lack of a clear definition for major life activities in the ADA caused “a great deal of confusion,” and resulted in a “myriad of definitions and approaches advocated by the EEOC, the courts, and commentators.”<sup>129</sup>

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<sup>123</sup> ADAAA § 4(a).

<sup>124</sup> See *supra* note 122.

<sup>125</sup> ADAAA §§ 4–5.

<sup>126</sup> 42 U.S.C. § 12102(2)(A).

<sup>127</sup> See generally Curtis Edmonds, *Snakes and Ladders: Expanding the Definition of “Major Life Activity” in the Americans with Disabilities Act*, 33 TEX. TECH. L. REV. 321, 323 (2002) (“The ADA does not define the term ‘major life activity.’”); Reagan S. Bissonette, Note, *Reasonably Accommodating Nonmitigating Plaintiffs After the ADA Amendments of 2008*, 50 B.C. L. REV. 859, 863–64 (2009) (discussing the EEOC’s regulations).

<sup>128</sup> See 29 C.F.R. § 1630.2(i) (2009) (“*Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”); 29 C.F.R. pt. 1630 app. 1630.2(i) (“‘Major life activities’ are those basic activities that the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching.”). See generally *infra* note 149 (noting notice of proposal rulemaking for revisions to ADA regulations).

<sup>129</sup> Wendy Hensel, *Interacting with Others: A Major Life Activity Under the Americans with Disabilities Act?*, 2002 WIS. L. REV. 1139, 1148; accord Edmonds, *supra* note 127, at 374 (“The chaotic process of separating major life activities from other activities is perhaps best seen as a manifestation of the larger problem of how to define disability.”); Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the “Disability” Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1446–47 (1999) (“[P]ossible variations in breadth continue to inject yet another element of uncertainty into the ‘major life activity’ analysis.”).



The ADAAA helps clarify this confusion, and provides a clear—though not exhaustive—list of major life activities.<sup>130</sup> The amendments provide that “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”<sup>131</sup>

The revised statute now largely adopts the activities set forth in the EEOC regulations and appendix, and provides additional examples.<sup>132</sup> Moreover, the ADAAA also clarifies that “major bodily functions” constitute major life activities under the ADA.<sup>133</sup> These functions “includ[e] but [are] not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”<sup>134</sup> These functions were not previously enumerated as major life activities in the EEOC regulations or appendix, and this clarification provides substantial guidance on this issue.<sup>135</sup>

Perhaps the most significant major life activity identified by the ADAAA is “working.”<sup>136</sup> Prior to the amendments, there was a substantial question whether working should be considered a major life activity, as the Supreme Court specifically left the question open in *Sutton*.<sup>137</sup> Indeed, the Court had even expressed its concerns over the “conceptual difficulty” of accepting working as a major life activity.<sup>138</sup> The ADAAA’s clear inclusion of working as a major life activity, combined with the

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<sup>130</sup> ADAAA, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555–56 (2008); Long, *supra* note 4, at 222 (“Instead of offering an actual definition, the [revised] Act includes a non-exhaustive list of major life activities as illustration.”).

<sup>131</sup> ADAAA § 4(a).

<sup>132</sup> See 42 U.S.C.A. § 12102(2) (West 2005 & Supp. 2009); 29 C.F.R. § 1630.2(i); *id.* at pt. 1630 app. 1630.2(i). Sitting and reaching are identified as major life activities in the appendix to the regulations, but do not appear in the ADAAA. ADAAA § 4(a); 29 C.F.R. pt. 1630 app. 1630.2(i). Similarly, the revised statute identifies eating, sleeping, bending, reading, concentrating, thinking, and communicating as major life activities, which are not set forth in the regulations or appendix. See 42 U.S.C.A. § 12102(2); 29 C.F.R. § 1630.2(i); *id.* at pt. 1630 app. 1630.2(i).

<sup>133</sup> ADAAA § 4(a).

<sup>134</sup> *Id.*

<sup>135</sup> See 29 C.F.R. § 1630.2(i); *id.* at pt. 1630 app. 1630.2(i); see also Eichhorn, *supra* note 129, at 1445 (“[I]t is unclear whether courts can allow physiological functions to qualify as major life activities.”); Long, *supra* note 4, at 223 (noting that after the ADAAA, “an impairment that substantially limits nonvolitional bodily functions can qualify as a disability.”).

<sup>136</sup> ADAAA § 4(a).

<sup>137</sup> 527 U.S. at 492 (“Because the parties accept that the term ‘major life activities’ includes working, we do not determine the validity of the cited regulations.”).

<sup>138</sup> *Id.* (“We note, however, that there may be some conceptual difficulty in defining ‘major life activities’ to include work.”).

amendments' enumeration of other specific major life activities, should help clarify the ambiguity that was present in the original statutory scheme and case law.<sup>139</sup>

### 3. Substantially Limited Under the ADAAA

The amendments make clear that one particular area of concern was the Supreme Court's previous analysis of whether an individual is *substantially limited* in performing a major life activity.<sup>140</sup> The ADAAA expressly states that "the Supreme Court . . . interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress."<sup>141</sup> Again, the statutory text of the ADA provided little guidance on what constituted a substantial limitation,<sup>142</sup> and the EEOC regulations and case law were left to fill in the void.<sup>143</sup> The regulations advised that one should look to the "nature and severity of the impairment," the "duration or expected duration of the impairment," and the "permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."<sup>144</sup>

Addressing the concern over the Supreme Court's interpretation of substantial limitation, the ADAAA provides significant clarification as to the meaning of this phrase in the statute.<sup>145</sup> The ADAAA states that the term "shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008."<sup>146</sup> The findings and purposes reflect that Congress intends a broad reading of the phrase, and rejects the narrow approach used by the Supreme Court.<sup>147</sup> Congress even rejected the EEOC's interpretation of "substantially limited" to

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<sup>139</sup> See ADAAA § 4(a).

<sup>140</sup> *Id.* § 2(a)(7).

<sup>141</sup> *Id.*

<sup>142</sup> See 42 U.S.C. § 12102 (2006).

<sup>143</sup> See 29 C.F.R. § 1630.2(j) (2009) (noting that "substantially limits" is defined as "[u]nable to perform a major life activity that the average person in the general population can perform" or "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.").

<sup>144</sup> 29 C.F.R. § 1630.2(j).

<sup>145</sup> ADAAA § 4(a); Long, *supra* note 4, at 219 ("[T]he new amendments expand the meaning of the phrase 'substantially limits' in several ways.").

<sup>146</sup> ADAAA § 4(a).

<sup>147</sup> *Id.* § 2. For example, the ADAAA states, "the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress." ADAAA § 2(a)(7).

mean “significantly restricted,”<sup>148</sup> and directed the agency to amend its regulations in accordance with the amendments.<sup>149</sup>

In the ADAAA, Congress also provided more specifics as to what substantially limits means, stating that “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”<sup>150</sup> Thus, if an individual has an impairment that is not currently active, that individual may still be protected by the statute.<sup>151</sup> Congress further provided that an individual must have only a single major life activity that is substantially limited to fall under the statute’s protection, as opposed to requiring multiple limitations.<sup>152</sup>

#### 4. Corrective Measures

Congress also addressed how an individual’s corrective measures or devices impact the “substantially limits” determination.<sup>153</sup> The ADAAA states that a court’s analysis of “whether an impairment substantially limits a major life activity” must be “made without regard to the ameliorative effects of mitigating measures.”<sup>154</sup> This amendment to the ADA overturns the Supreme Court’s decision in *Sutton*, which held that that “disability under the Act is to be determined with reference to corrective measures.”<sup>155</sup>

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<sup>148</sup> ADAAA § 2(a)(8) (“Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term ‘substantially limits’ as ‘significantly restricted’ are inconsistent with congressional intent, by expressing too high a standard.”). See 29 C.F.R. § 1630.2(j) (defining “substantially limits”).

<sup>149</sup> ADAAA § 2(b)(6) (stating that one of the purposes of this statute is “to express Congress’ expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term ‘substantially limits’ as ‘significantly restricted’ to be consistent with this Act, including the amendments made by this Act”); accord Long, *supra* note 4, at 219 (“Ultimately, Congress chose to punt and put the power to define the term ‘substantially limits’ in the [EEOC’s] hands.”). On September 16, 2009, the EEOC “voted to approve a Notice of Proposed Rulemaking (NPRM) to conform its ADA regulations to the Amendments Act of 2008. The NPRM was published in the Federal Register on September 23, 2009.” EEOC, Notice Concerning the Americans With Disabilities Act (ADA) Amendments Act of 2008, [http://www.eeoc.gov/laws/statutes/adaaa\\_notice.cfm](http://www.eeoc.gov/laws/statutes/adaaa_notice.cfm) (last visited Jan. 19, 2010).

<sup>150</sup> ADAAA § 4.

<sup>151</sup> *Id.*; Long, *supra* note 4, at 221 (noting that the amendments create “new hope to potential plaintiffs whose impairments are episodic in nature or in remission”).

<sup>152</sup> ADAAA § 4.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> 527 U.S. at 488. Congress was clear that one of the purposes of the amendments was “to reject the requirement enunciated by the Supreme Court in *Sutton* . . . and its companion cases that whether an impairment substantially limits a major life activity is to

More specifically, the ADAAA provides that the use of the following should not be considered in the determination of whether an individual is disabled under the statute: “medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies.”<sup>156</sup>

Congress also enumerated the utilization of “assistive technology,” “reasonable accommodations or auxiliary aids or services,” and “learned behavior or adaptive neurological modifications” as corrective measures that should not impact an individual’s protection under the ADA.<sup>157</sup> Thus, the amendments are clear that the courts should not consider the use of almost any corrective measure or device in the determination of whether an individual is disabled.<sup>158</sup> For example, an individual who walks well with the use of a prosthetic leg may still be disabled under the statute if that individual is substantially limited in the ability to walk without the use of the prosthetic leg.

The ADAAA provides one notable exception to the general rule, however, for the use of “ordinary eyeglasses or contact lenses.”<sup>159</sup> Thus, if an individual is not substantially limited in seeing when wearing eyeglasses, that individual will not be considered disabled under the statute.<sup>160</sup> Interestingly, this exception involves the exact corrective devices at issue in the Supreme Court’s *Sutton* decision—eyeglasses and contacts.<sup>161</sup>

## 5. Regarded as Disabled

Through the ADAAA, Congress also significantly changed the meaning of “regarded as disabled.”<sup>162</sup> Prior to the amendments, an indi-

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be determined with reference to the ameliorative effects of mitigating measures.” ADAAA § 2(b)(2). *But see id.* § 4 (providing exception for “ordinary eyeglasses or contact lenses”).

<sup>156</sup> ADAAA § 4.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* The amendments further define these devices, stating that “the term ‘ordinary eyeglasses or contact lenses’ means lenses that are intended to fully correct visual acuity or eliminate refractive error.” *Id.*

<sup>160</sup> *Id.* § 4. It is worth noting, however, that after the amendments, “if an employer uses a qualification standard based on an individual’s uncorrected vision, the employer must show that the standard is job-related and consistent with business necessity.” Long, *supra* note 4, at 221 (citing ADAAA § 5(b)).

<sup>161</sup> 527 U.S. at 475 (“[W]e hold that the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual’s impairment, including, in this instance, eyeglasses and contact lenses.”). *Id.*

<sup>162</sup> ADAAA § 4.

vidual could establish coverage under the ADA by demonstrating that she was regarded as having an impairment that *substantially limited a major life activity*.<sup>163</sup> The ADAAA alters this definition by eliminating the requirement that the employer must have perceived that the impairment was substantially limiting.<sup>164</sup> Thus, a plaintiff need only demonstrate “that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*.”<sup>165</sup> The amendments do not permit “regarded as” coverage for “transitory and minor” impairments, with “transitory” defined as an “impairment with an actual or expected duration of 6 months or less.”<sup>166</sup>

The amendments also make clear that an employer need not accommodate an individual who is regarded as disabled.<sup>167</sup> Thus, an employer “need not provide a reasonable accommodation” to an employee “who meets the definition of disability . . . solely under” the regarded-as definition.<sup>168</sup> This statutory amendment resolved an existing conflict in the courts over the breadth of the reasonable accommodation provision.<sup>169</sup>

### III. AN ANALYSIS OF DISABILITY CLAIMS

The recent amendments to the ADA in favor of broad coverage under the statute will require the federal courts to analyze disability claims more closely. The complexity of the new provisions will make this a difficult task for the courts, as evaluating disability claims was difficult long before the statutory amendments. Complicating matters further, the Supreme Court’s 2007 decision in *Twombly v. Bell Atlantic Corp.* suggests that a more rigid approach may be appropriate when consider-

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<sup>163</sup> 42 U.S.C. § 12102(2).

<sup>164</sup> ADAAA § 4; see Long, *supra* note 4, at 224 (“[A]n ADA plaintiff no longer faces the difficult task of proving that a defendant’s misperception of his or her condition was *so* severe as to amount to a belief that the condition substantially limited a major life activity.”).

<sup>165</sup> ADAAA § 4 (emphasis added).

<sup>166</sup> *Id.* The amendments do not define the term “minor.” *Id.*; Long, *supra* note 4, at 224.

<sup>167</sup> ADAAA § 6.

<sup>168</sup> *Id.*

<sup>169</sup> See, e.g., Lawrence Rosenthal, *Reasonable Accommodations for Individuals Regarded as Having Disabilities Under the Americans with Disabilities Act? Why “No” Should Not Be the Answer*, 36 SETON HALL L. REV. 895, 897 (2006) (“It is clear that this issue has now created a split among the United States Courts of Appeals, with four circuits agreeing that accommodations are required in cases involving plaintiffs regarded as disabled, four circuits believing that accommodations are not required in such cases, and four circuits not having decided the issue.”) (citations omitted).

ing employment discrimination claims.<sup>170</sup> Thus, the lower courts are receiving conflicting signals as to how strictly they should approach disability claims under the statute—Congress seems to be suggesting a more liberal approach, while the Supreme Court is more restrictive.<sup>171</sup>

Before considering the appropriate standard for pleading disability cases, it is useful to examine how the courts have treated disability claims in the wake of *Bell Atlantic*.<sup>172</sup> A recent study that I performed reveals that some courts are undeniably using the Supreme Court's plausibility standard to reject cases brought under Title VII.<sup>173</sup> This study did not examine the dismissal rates of *disability cases* following *Bell Atlantic*, however, and there has been only limited analysis of the impact of this decision on disability claims.<sup>174</sup>

Recently, I sought to fill this void in the academic scholarship by conducting an analysis of disability cases in the year before and year after the *Bell Atlantic* decision. My goal in performing this additional study was two-fold: First, I wanted to determine from a purely numeric standpoint whether courts relying on the *Bell Atlantic* decision are dismissing a higher percentage of disability cases than those courts that previously relied on *Conley v. Gibson*; Second, I wanted to explore whether the analysis used by the lower courts revealed that these courts were using the Supreme Court's plausibility standard as a justification for dismissing disability claims. This study does *not* attempt to measure absolute dismissal rates in the year before and year after *Bell Atlantic*, and does not consider *all* motions to dismiss decided during this timeframe. Instead, the analysis attempts to determine whether those courts in the study that relied on *Bell Atlantic* were more likely to dismiss an ADA employment discrimination case than those courts that relied on *Conley*.<sup>175</sup>

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<sup>170</sup> See Seiner, *supra* note 54, at 1037 (noting that several district court decisions “clearly illustrate that some district courts are not only applying the plausibility standard to Title VII claims, but that they are also raising the bar as to what an employment discrimination plaintiff must plead in the case”).

<sup>171</sup> Compare ADAAA, Pub. L. No. 110-325, 122 Stat. 3553, 3553–59 (2008), with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>172</sup> See *infra* notes 176–192 and accompanying text.

<sup>173</sup> Seiner, *supra* note 54, at 1029–34. Another study suggests that a higher percentage of civil rights claims were being dismissed after *Bell Atlantic*. Hannon, *supra* note 54, at 1815. A third study suggests a higher percentage of Title VII dismissals following *Bell Atlantic*. See Hatamyar, *supra* note 17, at 38.

<sup>174</sup> See Hatamyar, *supra* note 17, at 35–39 (performing empirical analysis of impact of *Iqbal* and *Bell Atlantic* on various claim types); Seiner, *supra* note 54; *infra* notes 176–192 and accompanying text.

<sup>175</sup> See generally Seiner, *supra* note 54 (performing similar analysis in Title VII context); Hannon, *supra* note 54 (performing empirical analysis following *Bell Atlantic* decision).

### A. Methodology

For this study, I examined 478 federal district court decisions, broken down into two different groups of opinions.<sup>176</sup> I constructed two searches in the Westlaw federal district court database designed to reveal the most relevant decisions involving a motion to dismiss brought pursuant to the ADA in the year before and following *Bell Atlantic*.<sup>177</sup> Though not necessarily exhaustive, the searches were broad and designed to be very inclusive.

For the first search, I examined those decisions involving a motion to dismiss a claim brought under Title I of the ADA (which prohibits employment discrimination)<sup>178</sup> or an employment-related retaliation claim brought under Title V of the ADA,<sup>179</sup> in the year before *Bell Atlantic* that cited the Supreme Court's *Conley* decision.<sup>180</sup> This search revealed a data set of 233 decisions.<sup>181</sup> Because the search terms used were extremely broad, an analysis of each of these decisions revealed fifty-nine relevant opinions.<sup>182</sup> The remaining decisions were excluded from the study for a variety of reasons, including that they were not brought under Title I or V of the ADA,<sup>183</sup> or that they involved a claim brought under a statute other than the ADA.<sup>184</sup>

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<sup>176</sup> See ADA Search Results (on file with author). The search results discussed in this Article were correct as of the completion of the study on December 4, 2008. However, "Westlaw does occasionally add cases to its database for various reasons." Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735, 757 n.134 (2008).

<sup>177</sup> The search focused on motions to dismiss brought under FED. R. CIV. P. 12(b)(6). A decision was not necessarily excluded from the study, however, if the motion to dismiss in the opinion was brought pursuant to a different provision of the rules. To the extent that a particular case involved multiple motions to dismiss that resulted in more than one opinion during the time-frame of the study, each opinion was treated as a separate result. Similarly, to the extent that multiple motions to dismiss were addressed by a court in a single opinion, they were analyzed as a single motion as part of this study. See ADA Search Results, *supra* note 176.

<sup>178</sup> See 42 U.S.C. §§ 12111–12117 (2006).

<sup>179</sup> See *id.* § 12203.

<sup>180</sup> The exact search used was "(Conley) /250 ("failure to state a claim" "12(b)(6)") /250 ("Americans with Disabilities Act" "ADA" "disability") & DA(after 5/14/2006) & DA(before 5/15/2007)". A week lag time was also included between the ending date for this data set of May 14, 2007, and the *Bell Atlantic* decision, which was issued on May 21, 2007.

<sup>181</sup> See ADA Search Results, *supra* note 176.

<sup>182</sup> See *id.*

<sup>183</sup> It was often not clear from the face of the decision which title(s) the claim was brought under, though most employment discrimination claims would typically proceed under Title I or Title V. *Cf.* *Osborne v. Okla. Employment Sec. Comm'n.*, 2006 WL 2090089, at \*3 (W.D. Okla. July 25, 2006) ("The courts are divided on whether a state employee may sue under Title II for employment discrimination when Title I expressly gov-

For the second search, I examined those decisions involving a motion to dismiss a claim brought pursuant to Title I of the ADA, or an employment-related retaliation claim brought under Title V of the ADA, in the year following *Bell Atlantic* that cited the Supreme Court's *Bell Atlantic* decision.<sup>185</sup> The one-year time frame considered began several days after the Supreme Court decision was issued, to give the district courts time to interpret and apply the decision.<sup>186</sup> This second search revealed 245 decisions, about the same number of opinions as the first search.<sup>187</sup> For the reasons discussed above, an analysis of each of these decisions revealed only sixty-five relevant opinions, creating a similar size data set.<sup>188</sup>

The similar data sets of the two searches makes the study appropriate for comparative purposes. I therefore examined each of the relevant decisions and categorized the opinions in one of three ways: 1) whether the decision granted a motion to dismiss the ADA claims in whole; 2) whether the decision granted a motion to dismiss the ADA claims in part; or 3) whether the decision denied in whole a motion to dismiss the ADA claims.<sup>189</sup> In cataloguing each opinion, I also identified the citation of each decision, the jurisdiction from which the case arose, and whether the plaintiff in the case was proceeding *pro se* or with representation.<sup>190</sup>

### B. Study Results

The study set forth in this Article analyzes the impact of the *Bell Atlantic* decision on motions to dismiss in the disability discrimination context. The analysis of 1) those ADA decisions issued the year prior to *Bell Atlantic* that relied on the *Conley* case, and 2) those decisions issued

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erns such conduct.”). Thus, categorizing the decisions was somewhat of a subjective process in this regard.

<sup>184</sup> See, e.g., *Holloway v. Corr. Med. Servs.*, 2007 WL 1445701, at \*1 (E.D. Mo. May 11, 2007) (case brought pursuant to Title II of the ADA and not considered a relevant decision to the study); *Burritt v. Potter*, 2007 WL 1394136, at \*1 (D. Conn. May 10, 2007) (case brought pursuant to the Rehabilitation Act and not considered a relevant decision to the study).

<sup>185</sup> The exact search used was “(Twombly) /250 (“failure to state a claim” “12(b)(6)”) /250 (“Americans with Disabilities Act” “ADA” “disability”) & DA(after 5/31/2007) & DA(before 6/1/2008)”.

<sup>186</sup> See *supra* notes 180, 185. The *Bell Atlantic* decision was issued by the Supreme Court on May 21, 2007. 550 U.S. at 544.

<sup>187</sup> See ADA Search Results, *supra* note 176.

<sup>188</sup> See *id.*

<sup>189</sup> See *id.*

<sup>190</sup> See *id.*



the year following *Bell Atlantic* that relied on the new Supreme Court decision revealed the results set forth in the table below:<sup>191</sup>

Table 1: Results of Disability Study				
	% of Motions Granted	% of Motions Granted-in-Part	% of Motions Granted or Granted-in-Part	% of Motions Denied
Pre- <i>Bell Atlantic</i> Opinions (59 Total)	54.2% 32 opinions	10.2% 6 opinions	64.4% 38 opinions	35.6% 21 opinions
Post- <i>Bell Atlantic</i> Opinions (65 Total)	64.6% 42 opinions	13.8% 9 opinions	78.5% 51 opinions	21.5% 14 opinions

The study revealed a higher percentage of district court opinions granting motions to dismiss in the disability context in the year following the *Bell Atlantic* decision compared to the year prior. Of the pre-*Bell Atlantic* decisions analyzed that cited *Conley*, the motions to dismiss were granted 54.2% of the time, and 64.4% of the motions to dismiss were at least partially granted. Comparatively, in the year following *Bell Atlantic*, 64.6% of the motions to dismiss were granted, while 78.5% of the motions were at least partially granted, when the courts cited the new Supreme Court decision.<sup>192</sup>

### C. Study Limitations

The study provides meaningful data on the impact of the *Bell Atlantic* decision on motions to dismiss brought in the disability discrimination context. Before drawing any conclusions from the study, however, it is important to consider the possible limitations of the research. Initially, given the limited number of ADA decisions addressing motions to dismiss in the employment discrimination context, the resulting data sets of the pre- and post-*Bell Atlantic* district court opinions were both quite small.<sup>193</sup> From a purely numerical standpoint, the limited number of cases makes it difficult to draw any substantial conclusions regarding the resulting differentials between the two data sets. For example, the 14.1% differential between those disability decisions that at least partially granted a motion to dismiss in the pre- and post-

<sup>191</sup> The results set forth in the table were compiled from the disability study discussed in this Article. *See id.*

<sup>192</sup> *See id.*

<sup>193</sup> *See* ADA Search Results, *supra* note 176.

*Bell Atlantic* opinions does not rise to a level of statistical significance.<sup>194</sup> Therefore, as more decisions are issued, further study on the impact of the *Bell Atlantic* decision on motions to dismiss in the disability context will be necessary.

Additionally, there may be some concern over possible publication bias from the study, as the research conducted for this Article examines only those decisions that are published in the Westlaw database and does not review any *unpublished* opinions which do not appear in this database. Although the study does focus exclusively on these published cases, this is equally true of both data sets that are being compared in this Article (i.e. the pre- and post-*Bell Atlantic* decisions), which greatly limits the likelihood of achieving skewed results. Thus, “the fact that any ‘reported case bias’ is equally present in both the pre- and post-[*Bell Atlantic*] case set allows for a meaningful comparison and analysis of any change.”<sup>195</sup>

Moreover, it is worth noting that while extremely broad, the searches constructed for this study do not necessarily identify every possible relevant case on this issue. A broader search could have been constructed that may have identified additional applicable decisions. The study conducted here was not intended to be exhaustive, however, and the searches were constructed to provide the most relevant decisions in the disability discrimination context both before and after the *Bell Atlantic* decision. Even with the searches utilized in this study, only about a quarter of the decisions analyzed (124 out of 478) proved to be on point, and an even broader search would likely have identified an even higher percentage of irrelevant opinions.<sup>196</sup> And, as already discussed, the purpose of the study was not to measure *absolute* dismissal rates in the year before and after *Bell Atlantic*.<sup>197</sup> Instead, the analysis attempts to determine whether those courts in the study that relied on

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<sup>194</sup> The Fisher’s Exact Test function of the FREQ procedure of SAS version 9.1 software (SAS Institute, Inc., Cary, NC, USA) was used to estimate probabilities of obtaining the observed differences in frequencies by chance alone. I would like to thank Timothy Mousseau for providing the statistical computations set forth in this Article. See Statistical Analysis of ADA Search Results (on file with author).

<sup>195</sup> Seiner, *supra* note 54, at 1031 (quoting Hannon, *supra* note 54, at 1829).

<sup>196</sup> The study performed could have gone back further in time in analyzing the pre-*Bell Atlantic* cases. I chose not to do so, however, for two reasons. First, the one-year time frame of the two searches provided a very similar size data set for comparative purposes. Second, by examining those decisions in the year most recent to the *Bell Atlantic* decision, we are able to see the trends in the cases immediately prior to the Supreme Court decision. See *id.* at 1027–31 (discussing methodology of similar study performed for Title VII discrimination cases); Hannon, *supra* note 54, at 1830–31 (discussing *Bell Atlantic* empirical analysis).

<sup>197</sup> Seiner, *supra* note 54, at 1031–32.

*Bell Atlantic* were more likely to dismiss an ADA employment discrimination case than those courts that relied on *Conley*.<sup>198</sup>

Finally, it should be considered that this study was conducted before the Supreme Court's recent ruling in 2009 in *Ashcroft v. Iqbal*.<sup>199</sup> It is still too early to undertake any substantive analysis of how the lower courts have treated the *Iqbal* decision. Though *Iqbal* largely confirms the *Bell Atlantic* plausibility standard,<sup>200</sup> additional research in this area will prove valuable as the courts grapple with both decisions, and continue to define the plausibility standard.

#### D. *Conclusions from the Study*

Irrespective of the limitations of the study discussed above, the data uncovered here are useful for examining the significance of the new plausibility standard announced by the Supreme Court on ADA cases. There are two different sets of information to consider: First, the purely numerical results of the study, and what impact—if any—*Bell Atlantic* has had on the percentage of decisions that dismiss disability claims.<sup>201</sup> Second, the reasoning of the opinions themselves.<sup>202</sup> An individual review of the cases in this study will help determine the extent to which the district courts are relying on the new plausibility standard to justify the dismissal of disability claims.<sup>203</sup> Although the numerical data are important, an individual case review helps bring this data to life.

##### 1. Numerical Results

The numerical results from the study set forth in the table above are straightforward. The study reveals a higher percentage of district court opinions granting motions to dismiss in the disability context in the year following the *Bell Atlantic* decision compared to the year prior to the Supreme Court case.<sup>204</sup> In the pre-*Bell Atlantic* opinions that rely on *Conley*, 54.2% of the motions to dismiss were granted, and 64.4% of the motions were at least partially granted.<sup>205</sup> In the year following *Bell Atlantic*, however, 64.6% of the motions to dismiss were granted and

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<sup>198</sup> See *id.* at 1031.

<sup>199</sup> See generally 129 S. Ct. 1937 (2009).

<sup>200</sup> See *id.* at 1949–54.

<sup>201</sup> See *infra* notes 204–209 and accompanying text.

<sup>202</sup> See *infra* notes 210–242 and accompanying text.

<sup>203</sup> See *infra* notes 210–242 and accompanying text.

<sup>204</sup> See *supra* notes 191–192 and accompanying text.

<sup>205</sup> See ADA Search Results, *supra* note 176.

78.5% of the motions were at least partially granted, when the courts cited the new Supreme Court decision.<sup>206</sup> The 14.1% differential between those disability decisions that at least partially granted a motion to dismiss in the pre- and post-*Bell Atlantic* opinions reflects the greater likelihood that a court relying on the *Bell Atlantic* decision will ultimately reject a disability allegation.<sup>207</sup>

To be sure, given the limited time-frame of the study and the resulting small number of cases in the data set, additional research on this issue is necessary as more time passes and additional decisions are issued. Nonetheless, the study's results are revealing and consistent with other research in this area: a prior analysis of civil rights claims (outside of the disability context) suggests that *Bell Atlantic* is having an impact on these claims.<sup>208</sup> Similarly, my prior study of the impact of *Bell Atlantic* on employment discrimination cases revealed that district courts relying on this Supreme Court decision are granting a higher percentage of motions to dismiss brought in the Title VII context than those courts that had previously relied on *Conley*.<sup>209</sup> The results set forth in this study are therefore not surprising. A closer examination, however, of the individual cases is necessary to determine the extent to which the lower courts are using the plausibility standard to reject disability claims.

## 2. Individual Examination of Case Law

Although the numerical results set forth above shed light on the impact of *Bell Atlantic*, an individual examination of the cases in the study helps reveal the true significance of the decision. The numbers uncovered from the study are concrete, while an individual case review of the impact of the *Bell Atlantic* decision is much more subjective. Nonetheless, the review of these decisions resulted in one seemingly concrete conclusion: the courts are confused as to how to analyze disability claims.

Initially, it should be noted that until recently there was a significant question as to whether *Bell Atlantic*—which arose as a complex antitrust case—should apply outside of the antitrust context.<sup>210</sup> In *Iqbal*,

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<sup>206</sup> See *id.*

<sup>207</sup> As previously noted, however, this differential does not rise to the level of statistical significance. See *supra* notes 193–200 and accompanying text.

<sup>208</sup> Hannon, *supra* note 54, at 1815, 1837 tbl. 3 and accompanying text.

<sup>209</sup> Seiner, *supra* note 54, at 1030, 1031.

<sup>210</sup> Cf. Hannon, *supra* note 54, at 1814–15 (“[W]hile some commentators have suggested that [*Bell Atlantic*] will only apply in the antitrust context, this study shows that courts have applied the decision in every substantive area of law governed by Rule 8.”).

however, the Supreme Court clarified that the plausibility standard should apply to *all* civil causes of action.<sup>211</sup> Even before *Iqbal*, the lower courts were applying the *Bell Atlantic* standard to the disability context, as district courts in almost every federal circuit cited the case in disability-related opinions during the time-frame of this study.<sup>212</sup> Relying on *Bell Atlantic* to resolve motions to dismiss brought in the disability context, district courts have stated that the complaint must “set forth sufficient facts to state a claim to relief that is plausible on its face,”<sup>213</sup> indicated that the complaint should “contain sufficient factual allegations to raise a right to relief above the speculative level,”<sup>214</sup> and noted that the *Bell Atlantic* decision “prescribed a new inquiry to use in reviewing a dismissal.”<sup>215</sup> The reach of *Bell Atlantic* is thus much broader than the complex antitrust context and extends to disability cases as well.

My previous study of Title VII cases revealed that the lower courts were using the new standard set forth in *Bell Atlantic* to raise the pleading bar and reject employment discrimination claims.<sup>216</sup> The same cannot be said for my analysis of disability claims, however. Indeed, the courts, by and large, have not relied on the plausibility standard to discard claims brought pursuant to the ADA. Rather, there is much more confusion and uncertainty in the disability context as to how the plausibility standard should be applied.<sup>217</sup> The amount of weight given to the *Bell Atlantic* test tends to vary significantly with the particular court, leaving the pleading standards in disarray for this area of the law.<sup>218</sup> For example, in 2007, in *Gannon v. Continuum Health Partners*, the U.S. Dis-

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<sup>211</sup> 129 S. Ct. at 1953.

<sup>212</sup> See, e.g., *Adkins v. Fairfax County Sch. Bd.*, 2008 WL 2076654, at \*2 (E.D. Va. May 15, 2008); *Elias v. Randstad Work Solutions*, 2008 WL 2036824, at \*1 (W.D. Tex. May 9, 2008); *Lyons v. Commonwealth Edison*, 2008 WL 4686153, at \*2 (N.D. Ill. May 5, 2008); *Cannady v. First Co.*, 2008 WL 1901197, at \*2 (W.D. Mo. Apr. 25, 2008); *Wyckoff v. Loveland Chrysler-Plymouth*, 2008 WL 927664, at \*1 (D. Colo. Apr. 3, 2008); *Sykes v. Potter*, 2008 WL 731394, at \*2 (S.D. Ohio Mar. 17, 2008); *Roberts v. Fulton*, 2008 WL 542680, at \*2 (N.D. Ga. Feb. 22, 2008); *Lee v. Sony BMG Music Entm't*, 557 F. Supp. 2d 418, 424 (S.D.N.Y. 2008); *Lorah v. Tetra Tech.*, 541 F. Supp. 2d 629, 633 (D. Del. 2008); *Manson v. Low Income Hous. Inst.*, 2007 WL 3129590, at \*1 (W.D. Wash. Oct. 23, 2007); *Spelke v. Gonzalez*, 516 F. Supp. 2d 76, 79 (D.D.C. 2007).

<sup>213</sup> *Smith v. Cmty. Coll.*, 2007 WL 2683831, at \*3 (W.D. Pa. Sept. 7, 2007) (adopting magistrate recommendation as opinion of the court).

<sup>214</sup> *Wright v. City of Trenton*, 2007 WL 2705162, at \*1 (D.N.J. Sept. 17, 2007).

<sup>215</sup> *Cox v. Kempton Co.*, 2008 WL 111328, at \*1 (W.D. Okla. Jan. 8, 2008).

<sup>216</sup> See *Seiner*, *supra* note 54, at 1014 (“[A]n individual examination of the decisions . . . revealed that the lower courts are unquestionably using the new plausibility standard to dismiss Title VII claims.”).

<sup>217</sup> See *infra* notes 217–242 and accompanying text.

<sup>218</sup> See *infra* notes 217–242 and accompanying text.

trict Court for the Southern District of New York granted a defendant's motion to dismiss the plaintiff's disability claim and noted that "the United States Supreme Court in *Bell Atlantic* . . . elevated the standard for pleading a claim."<sup>219</sup> The U.S. District Court for the Eastern District of New York, however, also citing to *Bell Atlantic*, declared less than a month earlier that "there is no heightened pleading requirement for suits alleging discrimination."<sup>220</sup>

This stark contrast is further evident in two district court cases from 2007: *Taggart v. Moody's Investors Service*<sup>221</sup> and *Cox v. True North Energy*.<sup>222</sup> In *Taggart*, a pro se plaintiff alleged that her former employer had discriminated against her because of her disability, and she further alleged constructive discharge in violation of the ADA.<sup>223</sup> In addressing the employer's motion to dismiss, the U.S. District Court for the Southern District of New York was troubled by the plaintiff's "unclear" pleadings as to her alleged disability.<sup>224</sup> Though the plaintiff's complaint referenced that she suffered from several impairments, the court held that she had failed to sufficiently allege a "disability" under the statute:

Plaintiff repeatedly refers to her "undiagnosed maladies," including numerous illness[es] following a laparoscopy in 1993, a "sudden abdominal crisis" which involved plaintiff's taking various antibiotics, a suppository plaintiff alleges was inserted by doctors into her uterus, a "deliberate needle injury" and a parasite infection that plaintiff alleges [was] so "severely crippling both physically and mentally["] . . . The descriptions of the undiagnosed maladies, however, are not sufficient to

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<sup>219</sup> 2007 WL 2040579, at \*2 (S.D.N.Y. July 12, 2007). The district court went on to note the more relaxed standard of the U.S. Court of Appeals for the Second Circuit announced in that circuit's *Iqbal* decision: "In a post-*Bell* decision, the United States Court of Appeals for the Second Circuit interpreting *Bell* stated, '[T]he [Supreme] Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible "plausibility standard," which obliges a pleader to amplify a claim with some factual allegation in those contexts where such amplification is needed to render the claim plausible.'" *Id.* (citation omitted). It is worth noting, however, that the outcome of the *Gannon* case did not seem to turn on the plausibility standard. *See id.* at \*3–\*5. Moreover, the Second Circuit's decision in *Iqbal* was subsequently overturned by the Supreme Court. *Iqbal*, 129 S. Ct. at 1942–43.

<sup>220</sup> *Sierotowicz v. N.Y. State Div. of Hous.*, 2007 WL 1825402, at \*1, \*2 (E.D.N.Y. June 21, 2007). The *Sierotowicz* case did arise outside of the disability discrimination context, however, and involved discrimination in housing. *Id.* at \*1–\*3.

<sup>221</sup> 2007 WL 2076980, at \*1 (S.D.N.Y. July 17, 2007).

<sup>222</sup> 524 F. Supp. 2d 927 (N.D. Ohio 2007).

<sup>223</sup> 2007 WL 2076980, at \*7.

<sup>224</sup> *Id.*

permit this Court to conclude that plaintiff has alleged a disability within the meaning of the ADA.<sup>225</sup>

The district court was equally unimpressed with the plaintiff's allegations that she suffered from Lyme disease, as the plaintiff had failed to allege how the disease impaired her work performance or how it substantially limited a major life activity.<sup>226</sup> In rejecting the complaint, the district court relied on the standard set forth by the Supreme Court in *Bell Atlantic*, holding that the allegations were "bereft of 'facts to state a claim to relief that is plausible on its face.'"<sup>227</sup> Though the complaint *may* have been dismissed appropriately on other grounds,<sup>228</sup> this rigid application of the plausibility standard to the disability context is alarming. To say that a "sudden abdominal crisis," a crippling parasite infection, and Lyme disease fail to plausibly allege a disability under the ADA certainly pushes the plausibility standard to the most restrictive possible limit.<sup>229</sup>

In *Cox*, however, we see the U.S. District Court for the Northern District of Ohio take the complete opposite approach from the court in *Taggart*. The plaintiff in *Cox* argued that her employer had improperly terminated her because she suffered from kidney cancer, and that her employer also failed to provide her with reasonable accommodations in violation of the statute.<sup>230</sup> Similar to the defendant in *Taggart*, the company in this case maintained that the plaintiff had failed to show that she was "disabled" under the ADA.<sup>231</sup> The *Cox* court was not persuaded by the defendant's argument, holding that the plaintiff had sufficiently alleged a disability at the motion to dismiss stage of the pleadings.<sup>232</sup> Thus, the court noted that the defendant had placed the "summary judgment 'cart' before the Rule 12(b)(6) motion to dismiss 'horse'." Whether *Cox* is and was legally 'disabled' under the anti-disability discrimination statutes is a fact-based inquiry and determination that 'is not generally motion to dismiss territory.'<sup>233</sup>

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<sup>225</sup> *Id.* (citations omitted).

<sup>226</sup> *Id.* at \*8.

<sup>227</sup> *Id.* (citing *Bell Atlantic*, 550 U.S. at 555).

<sup>228</sup> See *id.* at \*7-8. For example, there seems to be some question as to whether the defendant knew of some of the plaintiff's impairments, though it is not entirely clear that this alone would warrant dismissal of the case, as the defendant does appear to have had knowledge of the plaintiff's diagnosis of Lyme disease. *Id.*

<sup>229</sup> See 2007 WL 2076980, at \*7-8.

<sup>230</sup> 524 F. Supp. 2d at 943.

<sup>231</sup> *Id.* at 944.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* (citation omitted).

Therefore, the plaintiff's allegations that she suffered from cancer that substantially limited her ability to work (as well as other major life activities) at the time of her termination, and her assertion that the defendant denied a leave request for medical treatment, were sufficient to allege disability discrimination under the ADA.<sup>234</sup> In its decision, the court also highlighted the *Bell Atlantic* plausibility test, and emphasized the "uncertainty" that the decision left over the proper pleading standard.<sup>235</sup> The district court found the exact pleading standard irrelevant to this case, however, as the matter did not turn on the "nuances" of *Bell Atlantic*.<sup>236</sup> Nonetheless, referencing this standard, the court concluded that it was "*plausible* under the facts as alleged that [the plaintiff] was disabled."<sup>237</sup> Thus, the *Cox* decision demonstrates a district court unwilling to rigidly apply *Bell Atlantic* to the disability context, holding that fact intensive questions are best left for summary judgment.<sup>238</sup>

Finally, the confusion in the area of disability litigation is perhaps best seen in the 2007 case, *Parmenter v. Wal-Mart Stores*.<sup>239</sup> In *Parmenter*, the U.S. District Court for the District of Connecticut noted the uncertainty over the proper pleading standard in "cases outside of the anti-trust context," indicating that the issue "has already begun to generate discussion in the courts."<sup>240</sup> Rather than weighing in on the proper pleading standard, however, the court simply avoided the issue altogether, holding that the plaintiff's complaint under the ADA, "where deficient, is equally so under the Rule 12(b)(6) pleading regime in effect prior to *Bell Atlantic*."<sup>241</sup> The decision of the *Parmenter* court underscores the difficulty left in analyzing claims after the Supreme Court's decision in *Bell Atlantic*. The pleading standards should be transparent to both the courts and the litigants, and a U.S. district court should never need to avoid determining the proper standard to apply in a disability case.

Consistent with other areas of civil rights law, courts are granting a higher percentage of motions to dismiss in the disability context after

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<sup>234</sup> *Id.* at 944–45.

<sup>235</sup> *Id.* at 934 n.2.

<sup>236</sup> *Cox*, 524 F. Supp 2d at 934 n.2.

<sup>237</sup> *Id.* at 945 (emphasis added).

<sup>238</sup> *Id.* at 944.

<sup>239</sup> 2007 WL 2071625, at \*1 (D. Conn. July 16, 2007).

<sup>240</sup> *Id.* at \*3 n.4.

<sup>241</sup> *Id.*



*Bell Atlantic* when those courts rely on this new decision.<sup>242</sup> Unlike Title VII claims, however, courts do not appear to be using the *Bell Atlantic* plausibility standard to rigidly dismiss cases brought under the ADA. Rather, a closer analysis of the decisions reveals confusion in the courts over the proper pleading standard to apply, and conflict over the level of specificity needed to allege a disability claim. The *Taggart*, *Cox*, and *Parmenter* decisions clearly illustrate the lack of direction on disability pleading in the district courts, as these courts are inconsistent in their application of *Bell Atlantic* to disability claims. Unfortunately, this confusion will only intensify as courts begin to grapple with the ADAAA and how these amendments impact the pleading of a disability case. Plaintiffs and courts need a clear pleading standard now, before the uncertainty grows any further.

3. U.S. Court of Appeals for the Seventh Circuit's Decision in *EEOC v. Lee's Log Cabin*

Mirroring the confusion in the district courts over the proper pleading standard for disability claims after *Bell Atlantic*, a recent federal appellate decision further demonstrates the judiciary's uncertainty when attempting to analyze such cases. In *EEOC v. Lee's Log Cabin*, the EEOC sued the defendant on behalf of Korrin Krause Stewart, who was born HIV positive and developed AIDS early in her life.<sup>243</sup> After applying for a job as a waitress with the defendant, Stewart did not hear from the restaurant, and she later returned and asked if she could revise her application.<sup>244</sup> Stewart then noticed that "HIV+" was written on the top of her application; the assistant manager acknowledged making this notation and indicated that he had learned of her impairment in the local newspaper.<sup>245</sup> The restaurant did not hire Stewart for the position, maintaining that her lifting restrictions and inexperience as a waitress made her inappropriate for the job.<sup>246</sup>

The EEOC sued the restaurant and asserted that the defendant had failed to comply with the ADA when it decided not to hire Stewart.<sup>247</sup> The EEOC alleged that the decision not to hire Stewart was made by the

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<sup>242</sup> Hatamyar, *supra* note 17, at 35–38 (discussing various types of cases); Seiner, *supra* note 54, at 23 tbl. B (discussing Title VII cases); Hannon, *supra* note 54, at 1837 tbl. 3 (discussing civil rights cases).

<sup>243</sup> 546 F.3d 438, 440 (7th Cir. 2008), *reh'g denied* 554 F.3d 1102 (7th Cir. 2009).

<sup>244</sup> *Id.* at 440–41.

<sup>245</sup> *Id.* at 441.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

restaurant “because it learned that she was HIV positive.”<sup>248</sup> No mention was made in the complaint of Stewart’s AIDS status, and the EEOC did not raise this condition until responding to the employer’s motion for summary judgment.<sup>249</sup> In response to this motion, the EEOC filed documents establishing that Stewart’s activities were impaired as a result of her suffering from AIDS.<sup>250</sup> The district court criticized the EEOC for its late efforts to “shift the factual basis of the claim” from HIV to AIDS, which represented a “gross departure from what [the EEOC] alleged in the initial stages of this lawsuit.”<sup>251</sup> The district court rejected the documents the EEOC submitted outlining Stewart’s limitations, “because HIV and AIDS are not synonymous for purposes of the ADA.”<sup>252</sup> Without any evidence as to Stewart’s limitations, the court determined that the EEOC had not shown that Stewart’s HIV satisfied the definition of disability under the ADA, and granted judgment in favor of the employer.<sup>253</sup>

The U.S. Court of Appeals for the Seventh Circuit affirmed the district court opinion in 2008 in a split decision.<sup>254</sup> Citing *Bell Atlantic*, the majority emphasized the importance of providing sufficient notice to the defendant of the allegations in the case.<sup>255</sup> The court found that the EEOC’s complaint setting forth Stewart’s HIV status was distinct from an allegation that she also suffered from AIDS, and questioned why the EEOC waited so long to “disclose that Stewart had AIDS and that *this* was the actual basis for the discrimination alleged.”<sup>256</sup> The court found that the district court was within its discretion to reject the EEOC’s documents setting forth the impact of AIDS on Stewart’s activities, and that the record was therefore “silent about the effect of HIV” on Stewart.<sup>257</sup> This silence “necessarily” leads to the determination that

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<sup>248</sup> *Id.*

<sup>249</sup> *Lee’s Log Cabin*, 546 F.3d at 441.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* The court also concluded that “there was no evidence” that the restaurant “knew Stewart suffered from AIDS,” and found it “questionable” as to “whether Stewart was a ‘qualified individual’ under the ADA.” *Id.*

<sup>254</sup> *Id.* at 446.

<sup>255</sup> *Lee’s Log Cabin*, 546 F.3d at 443.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* Interestingly, the EEOC’s response to the defendant’s summary judgment motion included documents which “in some instances” explained how Stewart’s “HIV/AIDS” status “affected Stewart’s life activities.” *Id.* at 441. Thus, the EEOC’s documentation on Stewart’s limitations seems to have been broader than only showing how AIDS impaired her abilities—it also focused (at least somewhat) on her HIV status. *Id.*

the EEOC failed to show that Stewart was an individual with a disability under the ADA.<sup>258</sup>

In her dissent, Judge Williams criticized the distinction that was made by the district court and the majority between HIV and AIDS, noting that “[a] person diagnosed with AIDS is also HIV positive.”<sup>259</sup> Moreover, the “distinction improperly focus[es] on the name of Stewart’s disability rather than its effects on her life activities.”<sup>260</sup> Emphasizing that the two conditions should not be separated as part of an analysis under the ADA, Judge Williams stated:

[H]aving AIDS is not inconsistent with being HIV positive, nor is it a new “cause of action” under the ADA. . . . [T]he allegation in the complaint that Stewart was “HIV positive” is consistent with the fact that she has AIDS. It follows that the evidence regarding the impact that “HIV/AIDS” or AIDS has on Stewart’s life activities describes the impact that HIV has on Stewart’s life activities.<sup>261</sup>

Judge Williams therefore disagreed with the majority, concluding that Stewart had sufficiently set forth a disability under the ADA.<sup>262</sup>

Even at the federal appellate level, we see disagreement over what must be alleged in a complaint to state a claim under the ADA. The majority in *Lee’s Log Cabin* found that the EEOC’s failure to allege that the defendant had AIDS—instead of setting forth HIV as the impairment—was fatal to the Commission’s case.<sup>263</sup> The dissent, however, took a broader approach to the pleading requirements, concluding that the district court’s HIV/AIDS distinction was “erroneous and therefore unreasonable.”<sup>264</sup> Though a strong argument can be made for either ap-

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<sup>258</sup> *Id.* at 444. The majority further concluded that “Stewart was not a *qualified* individual under the ADA, and for this additional reason, summary judgment [for the restaurant] was appropriate.” *Id.* at 445–46 (emphasis added).

<sup>259</sup> *Id.* at 446 (Williams, J., dissenting).

<sup>260</sup> *Id.*

<sup>261</sup> *Lee’s Log Cabin*, 546 F.3d at 447.

<sup>262</sup> *Id.* at 448 (“Because the EEOC presented evidence demonstrating that Stewart’s disease—regardless of whether her disease is called ‘HIV,’ ‘HIV/AIDS’ or ‘AIDS’—substantially limits one or more of Stewart’s major life activities, it met its burden of demonstrating that Stewart is ‘disabled’ for purposes of the ADA.”). Judge Williams further disagreed with the majority on the question of whether Stewart was a *qualified* individual with a disability. *Id.* at 449.

<sup>263</sup> *Id.* at 443–45 (majority opinion).

<sup>264</sup> *Id.* at 446 (Williams, J., dissenting). In a dissent from the denial of rehearing en banc in this case, Judge Williams—joined by three other judges—stated that the majority’s decision was “inconsistent with our case law regarding general notice pleading standards.” *EEOC v. Lee’s Log Cabin*, 554 F.3d 1102, 1105 (Williams, J., dissenting).

proach, the confusion and inconsistency over the specificity with which a complaint must be alleged leads to significant difficulty in properly pleading an ADA claim. And, at least in this case, the result of that confusion had very unfortunate consequences.<sup>265</sup> Whether a litigant alleges discrimination because she suffers from HIV or AIDS, that individual should be entitled to pursue relief under the clear purpose and mandate of the statute.<sup>266</sup> A clear and concise pleading standard should therefore be established to resolve this confusion, and to assure that other individuals with disabilities do not slip through the cracks of the complaint.

#### IV. A NEW PROPOSAL FOR PLEADING DISABILITY

The data set forth in this Article establish a higher percentage of district court opinions granting motions to dismiss in the disability context in the year following *Twombly v. Bell Atlantic Corp.* when the courts cite to that decision compared to the year prior to *Bell Atlantic* when the courts cite to *Conley v. Gibson*.<sup>267</sup> This trend is consistent with civil rights and Title VII decisions issued after *Bell Atlantic*.<sup>268</sup> An individual review of the cases, however, fails to paint a picture of the federal courts consistently using the plausibility standard to reject ADA claims; instead, the case law demonstrates that a variety of approaches are now used to interpret disability allegations.<sup>269</sup> The confusion over the proper pleading standard for disability claims leads to inconsistent results, and can lead to the dismissal of a case for technical, rather than substantive, reasons.<sup>270</sup> If federal judges are unclear as to the appropriate pleading standard, it is certain that litigants will have even greater difficulties fashioning and responding to disability complaints.

Unfortunately, the confusion created by the *Bell Atlantic* decision will only intensify as the courts struggle to apply the recent amendments to the ADA. Though the plain statutory terms of the ADAAA are fairly clear, the broader message of the amendments conflicts with the *Bell Atlantic* decision.<sup>271</sup> *Bell Atlantic* has led to a more restrictive read-

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<sup>265</sup> *Lee's Log Cabin*, 546 F.3d at 444–45.

<sup>266</sup> Congress's first stated purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C.A. § 12101(b)(1) (West 2005 & Supp. 2009).

<sup>267</sup> See *supra* notes 170–266 and accompanying text.

<sup>268</sup> See *supra* notes 173, 201–266 and accompanying text.

<sup>269</sup> See *supra* notes 210–242 and accompanying text.

<sup>270</sup> See *supra* notes 243–266 and accompanying text.

<sup>271</sup> See *supra* notes 54–60, 173 and accompanying text.

ing of the pleading requirements,<sup>272</sup> while the ADAAA was intended to broaden the range of those entitled to bring disability claims.<sup>273</sup> These conflicting signals leave the courts and litigants confused as to how much specificity is necessary to properly allege an ADA claim.

A uniform pleading standard, therefore, is necessary to assist the courts and parties in applying the recently enacted ADA amendments to a disability complaint. A unified analytical framework for pleading claims of disability discrimination arising in the employment context would help resolve the majority of confusion that currently exists in this area of the law, taking the guesswork out of properly alleging a complaint.<sup>274</sup> Navigating *Bell Atlantic*, the recent U.S. Supreme Court decision in *Ashcroft v. Iqbal*, and the ADAAA, I propose a uniform pleading standard that would comply with the Supreme Court decisions and the amendments to the ADA. Though there are many possible standards, I attempt to develop an analytical framework for disability claims that is consistent with the case law, statute, and the federal rules, while not being overly restrictive of plaintiffs (and still providing adequate notice to defendants). I am aware of no proposal in the academic literature for a unified pleading standard for a claim of disability discrimination brought under Title I of the revised ADA.<sup>275</sup>

The proposed uniform framework for alleging claims under the ADA addresses the two major types of disability discrimination—taking an adverse action against an individual with a disability, and failing to reasonably accommodate those workers that have disabilities.<sup>276</sup> These two distinct claims deserve separate analyses, and a proposed pleading structure for each is discussed in more detail below. Each framework is intended to serve as a *minimum* pleading requirement, and litigants are free to be more descriptive in their complaints than what is proposed here.<sup>277</sup> It is also important to note at the outset that there are other possible claims of disability discrimination that are beyond the scope of this Article, most notably ADA harassment, retaliation, and disparate

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<sup>272</sup> See *supra* notes 54–60, 173 and accompanying text.

<sup>273</sup> See *supra* notes 107–169 and accompanying text.

<sup>274</sup> See Seiner, *supra* note 54, at 1042 (arguing for a unified pleading standard for Title VII cases, and noting that *Bell Atlantic* “has left the courts guessing as to how the plausibility standard should be applied”).

<sup>275</sup> Cf. *id.* at 1042–59 (proposing unified pleading standard for Title VII claims).

<sup>276</sup> See 42 U.S.C.A. § 12112(a)–(b) (West 2005 & Supp. 2009).

<sup>277</sup> Plaintiffs should be cautious, however, not to be so descriptive as to plead themselves out of court. See, e.g., *Am. Nurses' Ass'n v. Illinois*, 783 F.2d 716, 724 (7th Cir. 1986) (“A plaintiff who files a long and detailed complaint may plead himself out of court by including factual allegations which if true show that his legal rights were not invaded.”).

impact (unintentional discrimination) claims, as well as claims for unlawful medical inquiries. Additionally, the proposed model set forth here applies specifically to individual claims, rather than to systemic or class action disability cases. The model proposed below suggests a framework for evaluating the *substantive requirements* of an ADA claim and does not examine questions of jurisdiction or the essential prerequisites to filing a proper lawsuit.<sup>278</sup> Also, it should be noted that the EEOC is currently in the process of revising the ADA regulations.<sup>279</sup> Once these regulations are finalized, plaintiffs should make certain that their pleadings comply with these revised guidelines.

#### A. Adverse Action Claims

One of the most common forms of disability discrimination brought in the workplace context occurs when an employer takes an adverse action (e.g. termination) against an employee because of that individual's disability. After the recent amendments to the ADA, the statute is now clear that it is unlawful for an employer to "discriminate against a qualified individual on the basis of disability."<sup>280</sup> An individual can demonstrate a disability by showing "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," that the individual has a record of an impairment, or that the individual is regarded as having an impairment.<sup>281</sup> Moreover, the statute defines a qualified individual with a disability as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."<sup>282</sup>

To satisfy the recently revised statute, an individual alleging that an employer took an adverse action on the basis of a disability should therefore allege four elements in the complaint.

##### 1. Coverage

A plaintiff alleging disability discrimination under the ADA should set forth the victim of the unlawful act and establish coverage under the statute. Demonstrating coverage is one of the most critical components

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<sup>278</sup> See *Seiner*, *supra* note 54, at 1043, 1050 (discussing contours of proposed Title VII analytical framework).

<sup>279</sup> See *supra* note 149 (noting the notice of proposed rulemaking for revisions to ADA regulations).

<sup>280</sup> 42 U.S.C.A. § 12112(a).

<sup>281</sup> *Id.* § 12102(1).

<sup>282</sup> *Id.* § 12111.

of any disability case, as an individual not covered by the statute will not be permitted to proceed with her claim.<sup>283</sup> As already noted above, there are three ways to demonstrate coverage: by establishing an actual disability, a record of a disability, or a perceived disability.<sup>284</sup> The plaintiff should include some detail about the disability in the complaint, and not rely on a conclusory statement that she is simply “disabled.”<sup>285</sup> *Bell Atlantic* holds that plaintiffs must allege enough facts to state a plausible claim, and a conclusory statement that the plaintiff is “disabled” is therefore inconsistent with this holding.<sup>286</sup>

More specifically, if the plaintiff is attempting to establish ADA coverage by alleging an actual disability, that individual should first identify the impairment. The EEOC regulations define an impairment as:

- (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
- (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.<sup>287</sup>

The actual name of the impairment identified by the plaintiff is not important from a theoretical perspective, though it could prove critical from a practical standpoint, as seen in the U.S. Court of Appeals for the Seventh Circuit’s case, *EEOC v. Lee’s Log Cabin*, discussed in Part III.D.3.<sup>288</sup> Plaintiffs should therefore be cautious to carefully identify

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<sup>283</sup> *Id.*; see Michael Lee, *Searching for Patterns and Anomalies in the ADA Employment Constellation: Who Is a Qualified Individual with a Disability and What Accommodations Are Courts Really Demanding?*, 13 LAB. LAW. 149, 169 (1997) (describing the “disability” definition under statute as a “threshold issue for coverage under the ADA”).

<sup>284</sup> 42 U.S.C. § 12102(1).

<sup>285</sup> See, e.g., *Simpson v. Iowa Health Sys.*, 2001 WL 34008480, at \*4–\*5 (N.D. Iowa 2001) (noting in dicta that an ADA plaintiff must plead more than just the legal conclusion of having a disability) (citation omitted).

<sup>286</sup> See 550 U.S. at 570.

<sup>287</sup> 29 C.F.R. § 1630.2(h) (2009); see *supra* note 149 (noting notice of proposed rule-making for revisions to ADA regulations).

<sup>288</sup> See *supra* notes 243–266 and accompanying text. Compare 546 F.3d 438, 443–44 (majority opinion) (concluding that distinction between HIV allegation set forth in the complaint and AIDS was critical to the case), with *id.* at 446–47 (Williams, J., dissenting) (criticizing majority decision and concluding that the “distinction improperly focus[es] on the name of [the] disability”).

the impairment and plainly set forth any body systems that are affected as a result of the impairment. Specificity as to the particular impairment will help avoid any argument by the defendant that it failed to receive notice of the plaintiff's condition in the complaint.<sup>289</sup>

The plaintiff must further allege any major life activities that are substantially limited by the impairment.<sup>290</sup> The revised statute explicitly sets forth many major life activities (though this is not an exhaustive list), including "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."<sup>291</sup> The appendix to the EEOC regulations adds sitting and reaching to this list.<sup>292</sup> The complaint, then, should include the specific major life activity that is affected by the impairment, and assert (with any relevant factual detail) that the major life activity identified is "substantially limited."<sup>293</sup> Though many major life activities may be affected and included in the complaint, the revised statute makes clear that only a *single* activity *must* be identified.<sup>294</sup>

A plaintiff attempting to establish coverage through the "record of" provision of the statute should clearly set forth that at one time she either had or was thought to have an actual impairment.<sup>295</sup> The ADA regulations define a "record of" disability as having "a history of, or [having] been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."<sup>296</sup> Similar to coverage under the "actual" provision, then, the plaintiff should clearly

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<sup>289</sup> See *supra* notes 243–266 and accompanying text.

<sup>290</sup> See 42 U.S.C.A. § 12102(1) (West 2005 & Supp. 2009); *id.* § (4)(E) (providing, with limited exceptions, that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures").

<sup>291</sup> See 42 U.S.C.A. § 12102(2).

<sup>292</sup> See 29 C.F.R. § 1630.2(i); *id.* pt. 1630 app. 1630.2(i); see *supra* note 149 (noting notice of proposed rulemaking for revisions to ADA regulations).

<sup>293</sup> 42 U.S.C.A. § 12102(1).

<sup>294</sup> *Id.* § 12102(4)(C). To the extent the plaintiff identifies working as the major life activity that is limited, the plaintiff should also indicate (with any relevant factual detail) that she is substantially limited in performing "either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3); see also *supra* note 149 (noting notice of proposed rulemaking for revisions to ADA regulations). To the extent that the revised ADA regulations alter the definition of substantially limited in the context of working, plaintiffs should make certain to comply with the revised guidelines as well as any other changes. See *supra* note 149.

<sup>295</sup> 42 U.S.C. § 12102; 29 C.F.R. § 1630.2(k).

<sup>296</sup> 29 C.F.R. § 1630.2(k).



identify in the complaint the impairment that she either has or was thought to have, and in what way a major life activity is substantially limited as a result of that impairment.<sup>297</sup> Additionally, the plaintiff should allege whether she has a history of this impairment or whether she was “misclassified as having” the impairment.<sup>298</sup>

Finally, a plaintiff attempting to establish coverage under the “regarded as” provision of the statute must allege that the employer perceived her as disabled.<sup>299</sup> Similar to the other coverage provisions, a plaintiff must therefore assert the particular impairment or impairments that form the basis of the employer’s adverse employment action.<sup>300</sup> In contrast to the other two provisions, however, the plaintiff need allege no more.<sup>301</sup> Thus, after the amendments to the ADA, the plaintiff is no longer required to establish whether “the impairment limits or is perceived to limit a major life activity.”<sup>302</sup> In light of the amendments, however, the plaintiff should allege in the complaint that the perceived impairment is not “transitory” or “minor,” and that the impairment therefore exceeds six months in duration.<sup>303</sup> The plaintiff should further assert any additional facts indicating that the perceived impairment is not “minor” in scope.<sup>304</sup>

It should further be noted that although the plaintiff may establish coverage through an actual, a record of, or a perceived disability, there is nothing in the statute prohibiting the plaintiff from asserting more than a single basis for coverage.<sup>305</sup> Thus, for example, a plaintiff may set forth in the complaint that she has an actual disability *and* that the employer also perceived her as disabled. The plaintiff should be careful, however, to properly set forth all of the elements for each basis of coverage that is alleged.

## 2. Identify the Adverse Action

In addition to establishing coverage in the complaint, the plaintiff must also assert the adverse action that was suffered. In the classic case

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<sup>297</sup> 42 U.S.C. § 12102(1).

<sup>298</sup> 29 C.F.R. § 1630.2(k).

<sup>299</sup> 42 U.S.C.A. § 12102(1), (3).

<sup>300</sup> *Id.* § 12102(3).

<sup>301</sup> *See id.*

<sup>302</sup> *Id.* § 12102(3)(A).

<sup>303</sup> *See id.* § 12102(3)(B).

<sup>304</sup> *Id.* The statute does not specifically define the term “minor,” so any factual support establishing the severe nature of the perceived impairment should be set forth in the complaint to help the plaintiff survive this threshold inquiry. *Id.*

<sup>305</sup> 42 U.S.C.A. § 12102(1).

of *McDonnell Douglas Corp. v. Green* in 1973, the U.S. Supreme Court required that an employment discrimination plaintiff include the adverse action as part of the prima facie case of discrimination.<sup>306</sup> Typical adverse actions would include “termination, failure to promote, denial of transfer, or refusal to hire.”<sup>307</sup>

The federal courts have adopted varying interpretations as to what constitutes an adverse action, however, and the Supreme Court has never clearly defined the term.<sup>308</sup> Additionally, the ADA enumerates a number of prohibited adverse actions, including discrimination in “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”<sup>309</sup> The plaintiff should therefore make certain that the asserted adverse action is either expressly set forth in the statute or clearly recognized in the jurisdiction where the complaint is filed. The description of the adverse action should also be sufficiently detailed to provide the defendant with notice as to what constitutes the alleged wrongdoing. Certainly, letting the employer know what it has done wrong is a critical component of the complaint.<sup>310</sup>

Additionally, the plaintiff should set forth the approximate time(s) that the discriminatory act(s) took place. Although the plaintiff may not be certain of the exact date and time of the wrongdoing, she should assert her best estimate of when the discrimination occurred. This requirement not only assists the employer in investigating the al-

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<sup>306</sup> 411 U.S. 792, 802 (1973) (requiring, in a failure to hire case, that plaintiff show “that, despite his qualifications, he was rejected”).

<sup>307</sup> Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002) (discussing discrete acts of discrimination).

<sup>308</sup> See, e.g., Ernest Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove That the Employer’s Action Was Materially Adverse or Ultimate*, 47 U. KAN. L. REV. 333, 346 (1999) (discussing approaches of courts in interpreting adverse action); Seiner, *supra* note 54, at 1045–46 (discussing adverse action in Title VII context and noting that the Supreme Court has not defined what constitutes an adverse action).

<sup>309</sup> 42 U.S.C. § 12112(a).

<sup>310</sup> The complaint should similarly make clear that it is the *employer* that took the adverse action. This statement “implicitly alleg[es] that the defendant falls within the definition of ‘employer’ under” the statute. Seiner, *supra* note 54, at 1047 n.240. Nonetheless, a cautious litigant should further set forth in the complaint the rationale for the employer’s coverage under the ADA, though the prerequisites to bringing an ADA claim are beyond the scope of this Article, which focuses on the *substantive* requirements of bringing a disability claim. *Id.*

leged discrimination, but it further allows the court to determine if the plaintiff's claim is timely.<sup>311</sup>

### 3. Establish Qualification

The ADA requires the victim of the discrimination to be a "qualified individual."<sup>312</sup> Following the amendments to the ADA, a qualified individual is defined as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."<sup>313</sup> The plaintiff should therefore set forth in the complaint that she is qualified because she can perform the essential functions of the position. The plaintiff should also allege whether an accommodation is required to perform the job functions, or whether she can accomplish these tasks without an accommodation. If the plaintiff is able to provide any factual description regarding her ability to perform the essential job functions (e.g. "I have been performing this position successfully for the past 6 months."), it would further enhance her claim.

### 4. Discrimination Was "On the Basis" of Disability

The final component of the proposed analytical pleading framework requires the plaintiff to establish causation—showing that the discriminatory act was taken because of the plaintiff's disability. The revised statute prohibits taking an adverse action "against a qualified individual on the basis of disability."<sup>314</sup> The plaintiff must therefore allege the causal link between the discrimination and the disability itself, and include in the complaint that the employer's action was taken "on the basis" of the plaintiff's disability.<sup>315</sup> Establishing the employer's discriminatory intent in a case can be the most difficult hurdle for an em-

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<sup>311</sup> See *Hamera v. County of Berks*, 248 Fed. Appx. 422, 424 (3d Cir. 2007) ("In order to bring a civil action under Title VII, a plaintiff must first file a complaint with the EEOC. A plaintiff has 180 days to file a charge of employment discrimination pursuant to Title VII with the EEOC, or 300 days if proceedings were initiated with an appropriate local or state authority."); *Seiner*, *supra* note 54, at 1045–46 (discussing the timing of the adverse action for Title VII claims).

<sup>312</sup> 42 U.S.C.A. § 12112(a) (West 2005 & Supp. 2009) ("No covered entity shall discriminate against a *qualified* individual on the basis of disability.") (emphasis added).

<sup>313</sup> *Id.* § 12111(8).

<sup>314</sup> *Id.* § 12112(a).

<sup>315</sup> *Id.*

ployee to overcome.<sup>316</sup> For purposes of the pleading stage of the litigation, however, simply alleging the causal link between the adverse action and the disability should be sufficient to allow the case to proceed, as adequate notice is given to the defendant of the perceived discrimination, and as the proposed model also requires that the critical facts of the claim are included in the complaint. The sample pleading form found in the appendix to the federal rules makes clear that merely alleging causation is sufficient to state a claim under the rules, when other relevant facts are also included in the allegations.<sup>317</sup>

Plaintiffs should also consider the Supreme Court's 2009 decision in *Ashcroft v. Iqbal* when alleging intent.<sup>318</sup> In *Iqbal*, the Court noted that when determining whether discriminatory intent has been sufficiently alleged, the "factual context" of the complaint should be considered.<sup>319</sup> The Court further advised that a plaintiff cannot "plead the bare elements of his cause of action . . . and expect his complaint to survive a motion to dismiss."<sup>320</sup> The facts required by the proposed pleading framework set forth above should provide sufficient "factual context" for any adverse action ADA claim. This proposed pleading framework requires a plaintiff to assert the essential facts of the disability claim, thereby avoiding the general and conclusory allegations of discrimination that *Iqbal* prohibits.<sup>321</sup> Nonetheless, it will be important for litigants to follow the lower courts' interpretations of the recent *Iqbal* decision and to modify their pleadings depending upon the case law of the particular jurisdiction.<sup>322</sup>

It should also be noted that the original statute prohibited discrimination "because of the disability,"<sup>323</sup> which was subsequently revised by the ADAAA to prohibit discrimination "on the basis of disabil-

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<sup>316</sup> See, e.g., *Regenbogen v. Mustille*, 908 F. Supp. 1101, 1116 (N.D.N.Y. 1995) (noting that intent in employment discrimination case "is notoriously difficult to prove."); see also *Seiner*, *supra* note 54, at 1046–47 (discussing intent requirement for Title VII claims).

<sup>317</sup> See FED. R. Civ. P. app. of forms 11 ("On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff. As a result, the plaintiff was physically injured . . .").

<sup>318</sup> See generally 129 S. Ct. 1937 (2009).

<sup>319</sup> *Id.* at 1954.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> In light of *Iqbal*, plaintiffs may also want to consider rebutting in the complaint the reason the employer gave for taking the adverse action. See *id.* at 1950–51 (noting factual scenarios which are "more likely" than those alleged by *Iqbal* and *Bell Atlantic* plaintiffs). Though this should in no way be considered a requirement of the complaint, it may enhance the overall allegations in certain circumstances by discrediting the employer's "more likely" explanation. See *id.*; *Seiner*, *supra* note 73, at 33–49 (proposing unified pleading model for alleging discriminatory intent in Title VII cases).

<sup>323</sup> 42 U.S.C. § 12112(a) (2006).

ity.”<sup>324</sup> It remains to be seen what, if any, impact this change in terminology will have on the way that disability cases are decided.

### B. *Summary of Adverse Action Analytical Framework*

This proposed four-part framework for pleading all adverse action claims of discrimination under the ADA is deliberately straightforward and simple. The proposal was designed to provide a minimum pleading standard for litigants that complies with the recent amendments to the ADA, as well as the Supreme Court’s plausibility standard as set forth in *Bell Atlantic* (and confirmed by *Iqbal*). This proposed pleading standard should not be particularly burdensome for plaintiffs, as all of the required information should be within their knowledge when the complaint is filed.<sup>325</sup> At the same time, the facts provided in the complaint under this model are sufficient to state a “plausible” claim of disability discrimination and provide the defendant with adequate notice of the alleged wrongdoing.<sup>326</sup> In summary, a plaintiff alleging that her employer took an adverse action against her on the basis of her disability must set forth in the complaint the following four factors:

1. The victim of the discrimination and the basis for coverage;
2. The adverse action and the approximate time that it occurred;
3. That the individual was qualified; and
4. That the adverse action was taken on the basis of the individual’s disability.

An example of an allegation satisfying these four elements and providing a sufficient disability discrimination claim under the ADA would be:

I am paralyzed from the waist down, and I am substantially limited in the major life activity of walking. On July 11, 2009, my employer discriminated against me by failing to promote me to a supervisory position for which I applied. I am qualified for the position as I have previously performed all of the essential functions of the job successfully without any accom-

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<sup>324</sup> 42 U.S.C.A. § 12112(a) (West 2005 & Supp. 2009).

<sup>325</sup> See Seiner, *supra* note 54, at 1047–50, 1052 (discussing information available to employment discrimination plaintiff when complaint is filed, and providing summary of proposed framework for alleging Title VII claims).

<sup>326</sup> See *Bell Atlantic*, 550 U.S. at 570.

modation, and the decision not to promote was made on the basis of my disability.

Though simple, this allegation complies with the proposed pleading framework as it asserts the victim (“I” or the individual signing the complaint), the basis for coverage (paralysis limiting the ability to walk), the adverse action and time that it occurred (failure to promote on July 11, 2009), the plaintiff’s qualifications (able to perform essential job functions without accommodation), and causation (decision was made “on the basis of my disability.”). Thus, the brief statement provides all of the elements of a plausible ADA claim, and gives the defendant sufficient notice of its alleged wrongdoing. No more is required under the revised ADA, the *Bell Atlantic* and *Iqbal* decisions, or the federal rules.<sup>327</sup>

### C. Failure to Accommodate Claims

A second pleading framework is required for a distinct ADA allegation—a failure to accommodate claim. The ADA defines discrimination to include “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability” absent a showing of undue hardship.<sup>328</sup> The statute provides further guidance on what constitutes a reasonable accommodation, stating that it may include:

[M]aking existing facilities used by employees readily accessible to . . . individuals with disabilities; and . . . job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters . . . .<sup>329</sup>

With these statutory provisions in mind, I propose the following analytical framework for pleading all ADA reasonable accommodation

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<sup>327</sup> It should be emphasized, however, that plaintiffs must make certain also to comply with the revised EEOC ADA regulations, when those guidelines are finalized by the agency. See *supra* note 149.

<sup>328</sup> 42 U.S.C.A. § 12112(b)(5)(A). The ADA further prohibits “denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.” *Id.* § 12112(b)(5)(B).

<sup>329</sup> *Id.* § 12111(9).

claims. This five-part proposed pleading standard sets forth the minimum facts necessary for a plaintiff to state a plausible claim, while providing the defendant with adequate notice of the allegations.

### 1. Coverage

Similar to establishing an ADA adverse action claim, reasonable accommodation claims require the plaintiff to allege a disability.<sup>330</sup> Reasonable accommodation claims, however, differ in one significant aspect: a plaintiff is not entitled to an accommodation if that individual's only basis for coverage under the statute is that the employer regarded the plaintiff as disabled.<sup>331</sup> Thus, the ADA is now clear that an employer "need not provide a reasonable accommodation" to an employee "who meets the definition of disability . . . solely under" the regarded-as definition.<sup>332</sup> This distinction between adverse action claims and reasonable accommodation claims reflects a significant revision to the statute through the ADAAA,<sup>333</sup> and resolves a prior circuit split on the issue of whether an employer must accommodate an individual that it perceives as disabled.<sup>334</sup>

A plaintiff alleging that an employer failed to make a reasonable accommodation must therefore establish coverage under the ADA through either the actual or record-of prongs of the statute.<sup>335</sup> A plaintiff can thus demonstrate coverage by establishing "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."<sup>336</sup> Alternatively, the plaintiff can demonstrate "a record of such an impairment."<sup>337</sup> A plaintiff's allegations regarding actual or record-of disability would proceed identically to the framework discussed for adverse action claims.<sup>338</sup> Again, nothing would prohibit the plaintiff from alleging *both* an actual disability and a record of a disability.<sup>339</sup>

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<sup>330</sup> See *supra* notes 280–282 and accompanying text.

<sup>331</sup> 42 U.S.C.A. § 12201(h) (West 2005 & Supp. 2009).

<sup>332</sup> *Id.*

<sup>333</sup> See Pub. L. No. 110-325, § 6, 122 Stat. 3553 (2008).

<sup>334</sup> See, e.g., Rosenthal, *supra* note 169, at 897 (discussing circuit split on the issue of whether an employer must accommodate an individual that it regards as disabled).

<sup>335</sup> 42 U.S.C.A. § 12102(1)(A)–(B).

<sup>336</sup> *Id.* § 12102(1)(A).

<sup>337</sup> *Id.* § 12102(1)(B).

<sup>338</sup> See *supra* notes 283–305 and accompanying text.

<sup>339</sup> See *supra* notes 283–305 and accompanying text.

## 2. Establish Qualification

The ADA makes it unlawful to fail to accommodate “an otherwise qualified individual with a disability.”<sup>340</sup> A qualified individual under the ADA is “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”<sup>341</sup> A plaintiff would establish that she is qualified under the statute in the same manner that a plaintiff would for an adverse action claim—by setting forth in the complaint that she is able to complete the essential functions of the position, and by indicating whether a reasonable accommodation is necessary to perform the tasks of the job.<sup>342</sup> Again, providing further factual support indicating the plaintiff’s ability to complete the job functions would strengthen the individual’s claim.<sup>343</sup>

## 3. A Reasonable Accommodation Was Requested

The plaintiff must also set forth in the complaint that an accommodation was requested and that the requested accommodation was reasonable. The statute is clear that the employer’s obligation to accommodate an employee’s disability only relates to *reasonable* accommodations.<sup>344</sup> What a reasonable accommodation is will turn significantly on the facts of the particular case.<sup>345</sup> The Supreme Court has provided some guidance on the issue, noting that a reasonable accommodation is one that “seems reasonable on its face, *i.e.*, ordinarily or in the run of cases.”<sup>346</sup>

For purposes of the complaint, the plaintiff should explain exactly what accommodation was being sought, the approximate date of the request, and that the request was reasonable. To the extent the plaintiff is requesting an accommodation enumerated by the statute as a potentially reasonable accommodation (e.g. asking for an interpreter or a modified schedule),<sup>347</sup> the plaintiff should also indicate this fact in the complaint. And, if there is federal case law supporting the accommoda-

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<sup>340</sup> 42 U.S.C.A. § 12112(b)(5)(A).

<sup>341</sup> *Id.* § 12111(8).

<sup>342</sup> See *supra* notes 314–317 and accompanying text.

<sup>343</sup> See *supra* notes 314–317 and accompanying text.

<sup>344</sup> 42 U.S.C.A. § 12112(b)(5)(A).

<sup>345</sup> See, e.g., *García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 652 (1st Cir. 2000) (“‘Reasonable accommodation’ is also a capacious term, purposefully broad so as to permit appropriate case-by-case flexibility.”).

<sup>346</sup> *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002).

<sup>347</sup> 42 U.S.C.A. § 12111(9).



tion as reasonable, the plaintiff should indicate that the request is reasonable “in the run of cases.”<sup>348</sup> Finally, if the plaintiff’s condition prevented her from making a formal accommodation request, the plaintiff should also indicate this fact in the complaint. Though the employer is generally not obligated to provide an accommodation where an individual does not request one, there may be circumstances where this general rule does not apply.<sup>349</sup>

#### 4. The Accommodation Was Rejected by the Employer

In the complaint, the plaintiff must also assert that the requested accommodation was rejected by the employer, and she should further provide the date of that rejection.<sup>350</sup> In making this assertion, the plaintiff should indicate that she either engaged in the “interactive process” with the employer by participating in an open dialogue about the request, or she attempted to do so but her efforts were rebuffed.<sup>351</sup> Pursuant to the federal regulations, the interactive process should be designed to “identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”<sup>352</sup>

Additionally, the employee is not necessarily entitled to the particular accommodation that she requests, if other reasonable accom-

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<sup>348</sup> *Barnett*, 535 U.S. at 401.

<sup>349</sup> See EEOC Notice, EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Notice 915.002, at No. 40 (Oct. 17, 2002), available at <http://www.eeoc.gov/policy/docs/accommodation.html> [hereinafter ADA Enforcement Guidance] (“As a general rule, the individual with a disability—who has the most knowledge about the need for reasonable accommodation—must inform the employer that an accommodation is needed . . . . However, an employer should initiate the reasonable accommodation interactive process without being asked if the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.”); see also Selected Enforcement Guidance and Other Policy Documents on the ADA, [www.eeoc.gov/ada/adadocs.html](http://www.eeoc.gov/ada/adadocs.html) (last visited Dec. 1, 2009) (noting that EEOC will be reevaluating its ADA publications in light of the ADAAA).

<sup>350</sup> Similar to adverse action claims discussed above, a plaintiff should allege in the complaint (as a prerequisite to suit) that the employer is covered under the provisions of the ADA. See *supra* note 310.

<sup>351</sup> See ADA Enforcement Guidance, *supra* note 349, at No. 1 (“A request for reasonable accommodation is the first step in an informal, interactive process between the individual and the employer.”).

<sup>352</sup> 29 C.F.R. § 1630.2(o)(3) (2009).

modations exist.<sup>353</sup> Rather, the company can “choose among reasonable accommodations as long as the chosen accommodation is effective.”<sup>354</sup> Thus, the plaintiff should indicate in the complaint that the requested accommodation was rejected and that the defendant failed to offer any reasonable, effective alternative.<sup>355</sup>

#### 5. The Accommodation Does Not Cause an Undue Hardship

Finally, the plaintiff *should* assert in the complaint that the accommodation does not result in an undue hardship for the employer, though such an allegation should be considered *optional* for the plaintiff’s complaint.<sup>356</sup> An employer need not provide an accommodation to an employee if the accommodation would cause an undue hardship.<sup>357</sup> The statute defines undue hardship as “an action requiring significant difficulty or expense,”<sup>358</sup> when considering such factors as the nature of the request, the resources of the employer and facility, and the type of operations of the business.<sup>359</sup>

The burden of proof on the issue of undue hardship *rests with the employer*; which, under the statute, must “demonstrate that the accommodation would impose” this burden.<sup>360</sup> The Supreme Court has further advised that once a plaintiff shows that the accommodation is reasonable, “the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.”<sup>361</sup> Nonetheless, the employee is likely aware of numerous facts about the cost of the accommodation, the type of business of the employer, and the resources of the facility.<sup>362</sup> The plain-

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<sup>353</sup> See ADA Enforcement Guidance, *supra* note 349, at No. 9 (discussing employer’s obligation to provide a reasonable accommodation).

<sup>354</sup> *Id.*

<sup>355</sup> See *id.* (“[A]s part of the interactive process, the employer may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability.”).

<sup>356</sup> See *infra* notes 365–366 and accompanying text.

<sup>357</sup> See 42 U.S.C.A. § 12112(b)(5)(A) (West 2005 & Supp. 2009) (noting that an employer must provide reasonable accommodation to an employee “unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity”).

<sup>358</sup> See *id.* § 12111(10)(A).

<sup>359</sup> See *id.* § 12111(10)(B). The statute sets forth numerous factors to consider as part of the undue hardship analysis, and these factors should all be analyzed in determining the existence of an undue hardship. See *id.*

<sup>360</sup> *Id.* § 12112(b)(5)(A).

<sup>361</sup> *Barnett*, 535 U.S. at 402.

<sup>362</sup> See 42 U.S.C. § 12111(10)(B).

tiff should therefore include a statement in the complaint that the accommodation does not result in an undue hardship to the employer, and the plaintiff should further provide any additional facts on this issue as deemed appropriate under the circumstances of the case.<sup>363</sup> Thus, alleging facts related to the undue hardship question should be deemed *optional* for the plaintiff's complaint as the burden of proof on this question rests with the employer.<sup>364</sup> I believe, however, that providing some underlying facts regarding the lack of an undue hardship early in the litigation would enhance the plaintiff's overall claim.

#### D. *Summary of Reasonable Accommodation Analytical Framework*

Similar to the proposed pleading framework for adverse action claims, the proposed model set forth above for reasonable accommodation claims is deliberately simple. The suggested analytical framework is designed to provide a blueprint for the parties to easily assure that they have complied with the pleading requirements of the statute and federal rules. The model serves as a minimum threshold for pleading an ADA case, and a plaintiff setting forth the following five factors would satisfy both the revised statute and the plausibility pleading standard of *Bell Atlantic* and *Iqbal*:

1. The victim of the discrimination and the basis for coverage;
2. That the individual was qualified;
3. That a reasonable accommodation was requested;
4. That the accommodation was rejected by the employer; and
5. That the accommodation does not result in an undue hardship.

The simplicity of the reasonable accommodation analytical framework can also be seen through the following example of a disability allegation that would satisfy the pleading requirements of the federal rules:

I am blind and substantially limited in the major life activity of seeing. I am qualified for my position as a technician and have performed my job successfully for over a year. On July 1, 2009, I requested that my employer reasonably accommodate me by providing voice recognition software for my computer. This

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<sup>363</sup> See *Barnett*, 535 U.S. at 402 (discussing fact-specific nature of undue hardship inquiry).

<sup>364</sup> As the employer bears the burden of proof on the question of undue hardship, a court *should not dismiss* a complaint that fails to allege that the accommodation does not result in an undue hardship.

software is inexpensive and would not result in an undue hardship to my employer. However, the request was denied on July 15, 2009, and no alternative accommodation was offered as my employer failed to engage in an interactive process.

The above example thus demonstrates that only a few factual assertions are necessary to comply with the proposed analytical framework for pleading reasonable accommodation claims under the ADA. A plaintiff that complies with the proposed model, however, will also have satisfied the requirements of *Bell Atlantic*, *Iqbal*, and the ADA as revised by the ADAAA.<sup>365</sup> No further detail is necessary for purposes of the complaint.<sup>366</sup>

## V. IMPLICATIONS OF PROPOSED PLEADING FRAMEWORK

The proposed analytical model for pleading disability claims would have several implications for ADA litigants and the courts.<sup>367</sup> Perhaps the most significant benefit of the proposal would be the elimination of the confusion that currently exists in analyzing disability claims. As already discussed, the courts have taken varying approaches to ADA claims after *Twombly v. Bell Atlantic Corp.*, and the complex amendments to the ADA have only added to the confusion.<sup>368</sup> Through a unified approach to disability claims, litigants and the courts can easily determine whether a plaintiff's complaint satisfies the proposed model. If a complaint is deficient in some way, the shortcoming would be easily identified and a plaintiff could be given an opportunity to amend the pleadings to come into compliance. If a plaintiff is unable to do so, then the complaint should be rejected under the statute and Supreme Court case law for failing to state a plausible ADA claim. Thus, the proposed model simplifies the overly complex pleading process that currently exists and provides a clear-cut framework for the courts and litigants to apply.<sup>369</sup>

The streamlined approach of the proposed analytical framework will also save judicial resources through the simplified pleading process. Through a unified pleading standard, the parties will spend less time

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<sup>365</sup> See *Iqbal*, 129 S. Ct. at 1937; *Bell Atlantic*, 550 U.S. at 544.

<sup>366</sup> It should be emphasized again, however, that plaintiffs must make certain to also comply with the revised EEOC ADA regulations, when those guidelines are finalized by the agency. See *supra* note 149.

<sup>367</sup> See Seiner, *supra* note 54, at 1053–59 (providing similar discussion of implications of implementing proposed pleading model for Title VII employment discrimination claims).

<sup>368</sup> See *supra* notes 206–274 and accompanying text.

<sup>369</sup> See Seiner, *supra* note 54, at 1053 (discussing benefit of “simplicity” when using unified pleading framework for Title VII claims).

fighting over the necessary requirements of the complaint, and the courts will therefore spend less effort resolving these disputes. A more straightforward approach to the process also makes it easier for plaintiffs to properly allege a complaint in the first instance, again saving the parties time and effort in not having to redraft a complaint or respond to multiple pleadings. Additionally, through the proposed model, a court can more quickly determine the sufficiency of a complaint by comparing the plaintiff's pleadings against the unified standard.<sup>370</sup>

Similarly, the proposed model would lead to more uniformity in the pleading process and therefore more predictability as to the ultimate success or failure of a plaintiff's claim. More certainty and predictability in the process "increases the likelihood of settlement between parties," which can result in "reduced litigation costs."<sup>371</sup> Less litigation and an increased rate of settlement would likely benefit all of the parties, as well as the entire judicial system through a reduced employment discrimination case load.<sup>372</sup>

The proposed pleading model also offers a significant benefit to plaintiffs by reducing the likelihood of a procedural misstep that would result in the dismissal of the case. As we saw in the U.S. Court of Appeals for the Seventh Circuit's decision in *EEOC v. Lee's Log Cabin*, even the manner in which the impairment is characterized in the complaint can lead to the rejection of the plaintiff's entire case.<sup>373</sup> The model set forth above provides a clear blueprint for plaintiffs to follow, thereby reducing the chance that a key component of the case will be inadvertently omitted from the pleadings.

Finally, although there is significant disagreement over the implications of the *Bell Atlantic* decision and the Supreme Court's plausibility pleading standard,<sup>374</sup> commentators seem to agree that the decision

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<sup>370</sup> See Seiner, *supra* note 54, at 1054–55 (discussing benefit of saving judicial resources when using unified pleading framework for Title VII claims).

<sup>371</sup> Seiner, *supra* note 176, at 790 (citation omitted). See generally Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 Wis. L. REV. 655, 662 ("The more certain the law—the less the variance in expected outcomes—the more likely the parties will predict the same outcome from litigation, and the less likely that litigation will occur because of differences in predicted outcomes.").

<sup>372</sup> See Seiner, *supra* note 54, at 1055 (discussing how uniformity in pleading can lead to possibility of more settlements early in case).

<sup>373</sup> See *supra* notes 250–274 and accompanying text.

<sup>374</sup> Hannon, *supra* note 54, at 1824 ("In analyzing *Twombly* and *Erickson*, the commentator response to the decision has run the gamut. On one end, a number of writers have concluded that *Twombly* is best understood as a decision extending only to pleading in antitrust contexts. At the other end, writers believe that *Twombly* signals a revolutionary overhaul of the entire concept of notice pleading.").

“means an increase in the litigation over pleadings before federal district courts.”<sup>375</sup> Similarly, more litigation can be expected to result from the amendments to the ADA, as the courts struggle to determine how the complex revisions impact disability claims.<sup>376</sup> The proposed analytical framework would eliminate the need for much of this litigation, as a clear standard would be established for disability claims. The simple test set forth above would answer the question of what plausibility means in the disability context and resolve any confusion as to whether a plaintiff’s complaint is in compliance with the recent revisions to the ADA. Thus, adopting the proposed model would head off a significant amount of disability litigation that is almost certain to follow from the ADAAA and recent Supreme Court pleading decisions.

Some might argue, though, that the proposed analytical framework creates too low of a threshold for plaintiffs to satisfy. It is true that the model creates a simple and straightforward pleading standard. The notice pleading requirement of the federal rules, however, was not intended to create an onerous burden for plaintiffs.<sup>377</sup> The proposed model set forth in this Article carefully constructs a framework for pleading a plausible claim of disability discrimination under the ADA. The standard therefore comports with the *Bell Atlantic* and *Ashcroft v. Iqbal* decisions, the amendments to the ADA, and the federal rules. Under the proposed framework, a defendant will receive facts relating to the victim, the victim’s qualifications, the basis for coverage under the statute, the type of disability discrimination that is alleged, when the discrimination occurred, and the causal link between the employer’s action and the discrimination.<sup>378</sup> In the aggregate, these facts certainly provide the defendant with fair notice of the claim against it and enable the employer to begin an investigation into the matter.<sup>379</sup>

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<sup>375</sup> See *id.* at 1824–25. See generally Seiner, *supra* note 54.

<sup>376</sup> See Long, *supra* note 4, at 229 (“Whether these amendments [to the ADA] will produce dramatic changes in terms of the overall effectiveness of the ADA, however, remains to be seen.”).

<sup>377</sup> See, e.g., Christopher Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 561 (2002) (“The Rule 8(a)(2) mandate that a federal pleading be ‘a short and plain statement of a claim showing that the pleader is entitled to relief’ requires that a claim be stated with brevity, conciseness, and clarity. The Rule was designed to avoid technicalities.” (citing 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1215 (3d ed. 2004))).

<sup>378</sup> See *supra* notes 367–377 and accompanying text; *infra* notes 379–383 and accompanying text.

<sup>379</sup> See Seiner, *supra* note 54, at 1056 (discussing proposed Title VII pleading framework and information necessary for employer to investigate discrimination allegations); see also *EEOC v. J.H. Routh Packing Co.*, 246 F.3d 850, 854 (6th Cir. 2001) (“An accusation of

Similarly, it could be argued that the proposed approach requires *too much* of the plaintiff and that pleading numerous facts relating to the claim goes beyond the requirements of notice pleading.<sup>380</sup> Although a valid concern, the *Bell Atlantic* and *Iqbal* decisions are clear that a factual basis for the plaintiff's claim must be set forth in the complaint.<sup>381</sup> The proposed model attempts to formulate a minimum standard of factual pleading for disability plaintiffs, thus requiring the pleading of only those facts that would be essential to any ADA claim. Most importantly, however, all of the required facts of the pleading proposal should be within the plaintiff's knowledge at the time that the complaint is filed. The framework does not create any significant burden for plaintiffs—rather, it simply requires that they clearly and concisely frame the basic elements of their disability claims.

One additional potential concern of adopting a unified pleading framework is that it may result in an increase in meritless litigation. A system that is simple and easier for litigants to understand may indeed result in more litigants availing themselves of that system, regardless of the merit of their claims. Although it is possible that adopting a uniform pleading standard would result in an increase in frivolous disability claims, much of this litigation would be eliminated as the cases proceed in litigation. Additionally, although the proposed framework may result in some additional expense, “this is unfortunately the cost that must be incurred by the judicial system to make certain that legitimate claims are not unfairly dismissed.”<sup>382</sup> It is worth noting that the new sys-

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discrimination on the basis of a particular impairment provides the defendant with sufficient notice to begin its defense against the claim.”). It should also be considered that ADA plaintiffs must “file a charge of discrimination with the EEOC prior to bringing suit, and defendants receive notice of this charge.” Seiner, *supra* note 54, at 1049 n.253. Thus, the employer “typically will have received [at least some] notice of the allegation of discrimination long before a federal complaint is ever filed.” *Id.*; accord 42 U.S.C.A. § 12117(a) (West 2005 & Supp. 2009) (“The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides . . . to any person alleging discrimination on the basis of disability in violation of any provision of this chapter . . .”).

<sup>380</sup> See Seiner, *supra* note 54, at 1056 (discussing potential concern that proposed Title VII pleading framework “is too onerous for plaintiffs”).

<sup>381</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (noting that the federal rules “demand[] more than an unadorned, the-defendant-unlawfully-harmed-me accusation”); *Twombly v. Bell Atlantic Corp.*, 550 U.S. 544, 570 (2007) (complaint must allege “enough facts to state a claim to relief that is plausible on its face”).

<sup>382</sup> Seiner, *supra* note 54, at 1057; see also Elaine Korb & Richard Bales, *A Permanent Stop Sign: Why Courts Should Yield to the Temptation to Impose Heightened Pleading Standards in § 1983 Cases*, 41 BRANDEIS L.J. 267, 293–94 (2002) (arguing against rigid pleading stan-

tem could likely absorb some additional costs, as the simplicity of the unified pleading framework will result in the saving of significant judicial resources, as discussed above. Furthermore, as the Supreme Court has even acknowledged, the “simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.”<sup>383</sup>

In the end, the proposed analytical framework set forth in this Article would bring simplicity to a complex pleading process. A clear, concise and coherent standard for asserting disability claims would yield a number of benefits to the courts and litigants that would far outweigh any potential concerns. The growing uncertainty in this area of the law must be addressed, and adopting a unified pleading standard would be the best way to resolve the current confusion surrounding the pleading of disability claims.

### CONCLUSION

The Supreme Court’s *Bell Atlantic* decision and the amendments to the ADA have left disability pleading in disarray, and the Court’s recent *Iqbal* ruling only adds to this confusion. As the law further develops in this area, there is likely to be increased litigation and sharp division over how the revised statute and Supreme Court case law should be applied to disability plaintiffs. If adopted, the analytical framework for analyzing disability claims set forth in this Article would help resolve much of the confusion in this area of the law and potentially prevent a great deal of unnecessary litigation on these issues. An individual with a disability encountering discrimination in employment should not face a burdensome process when trying to state a claim against an employer. A uniform pleading model is therefore needed to streamline the process, to create a clear approach for plaintiffs to follow, and to eliminate the guesswork currently involved in preparing a disability complaint.

“We know that equality of individual ability has never existed and never will, but we do insist that equality of opportunity still must be sought.”<sup>384</sup> A simplified pleading model will help those with disabilities secure equal rights and opportunities and more fully avail themselves of the protections set forth in the ADA.

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dards and stating that “[t]he interests of all should not be sacrificed for the benefit of a few”).

<sup>383</sup> *Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002).

<sup>384</sup> 5 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 200–02 (1938).